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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

STATE OF IOWA, ETC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether a provision of the Agriculture and Food Act of 1981, 7 U.S.C. 1444d(b)(2)(D), which provides that the Secretary of Agriculture "may" make direct cash payments to farmers affected by natural disasters "whenever the Secretary determines that" such losses have created an economic emergency and that federal crop insurance and other forms of federal assistance are "insufficient" to alleviate the emergency, commits implementation decisions to agency discretion as a matter of law.

2. Whether 15 U.S.C. 714b(c), which provides that "no * * * injunction * * * be issued against" the Commodity Credit Corporation, which administers such disaster payments, precludes the entry of an injunction requiring the Secretary to utilize his discretionary authority to make cash disaster payments.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were John R. Block, Secretary of Agriculture, and the Department of Agriculture. Effective March 7, 1986, Richard E. Lyng succeeded Mr. Block as Secretary of Agriculture, and accordingly Mr. Lyng has been substituted as a petitioner in this case.

Appellants in the court of appeals were the State of Iowa and several individual farmers who intervened in the district court: Danny and Carene Gettler, H.S. and Maxine Lovett, Robert and Hope Mendenhall, and Tom and Linda Watkins.

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v.

STATE OF IOWA, ETC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Richard E. Lyng, Secretary of Agriculture, and the Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 771 F.2d 347. The opinion of the district court (App., *infra*, 24a-33a) is reported at 626 F.Supp. 15.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 34a) was entered on August 15, 1985, and a petition for rehearing was denied on December 5, 1985 (App., *infra*, 35a).

On February 25, 1986, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including May 4, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agriculture and Food Act of 1981, 7 U.S.C. 1444d(b)(2), the Commodity Credit Corporation Charter Act, 15 U.S.C. 714b(c), and the Administrative Procedure Act, 5 U.S.C. 701(a), are set forth at App., *infra,* 36a-38a.

STATEMENT

1. Among the many measures Congress has empowered the Secretary of Agriculture to employ to alleviate economic hardship is the authority to make cash disaster payments under the so-called Special Disaster Payment Program (SDPP).[1] The SDPP has two components authorizing the Secretary to make cash payments to feed grain producers whose crops have been affected by a natural disaster. The "mandatory" portion of the program requires the Secretary to make payments to producers *not* eligible for federal crop insurance if he determines that natural conditions prevented them from planting or harvesting. 7 U.S.C. 1444d(b)(2)(A) and (B). The "discretionary" portion of SDPP (7 U.S.C. 1444d(b)(2)(D)) provides that when federal crop insurance *is* available, the Secretary "may make disaster payments" if he makes cer-

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[1] "SDPP" is an abbreviated way of referring to provisions of the Agriculture and Food Act of 1981 that authorize the Secretary to make cash disaster payments to producers of various crops: feed grain (7 U.S.C. 1444d(b)(2)); upland cotton (7 U.S.C. 1444(g)(4)); rice (7 U.S.C. 1441(i)(3)); and wheat (7 U.S.C. 1445b-1(b)(2)). This case involves the provision for feed grain producers. For purposes of simplicity we will refer to that provision as the SDPP.

tain threshhold determinations (*i.e.*, that an economic emergency exists, that crop insurance and other forms of federal assistance are insufficient, and that additional assistance must be made available to alleviate the emergency).

2. When a severe drought affected grain and livestock producers in 1983, the Department of Agriculture monitored its impact through various federal, state and local agencies. The Department also reviewed requests for assistance from officials of several states, including Iowa (C.R. 19).[2] In response, the Secretary implemented an array of measures to lessen the economic impact: he provided federal disaster loans and economic emergency loans, waived the prohibition on grazing and haying on land required to be devoted to conservation use under production adjustment programs, and implemented a feed assistance program. Iowa farmers benefited substantially from these and other federal programs, including federally-subsidized crop insurance.[3] The Secretary did not, however, implement certain other programs and respondents brought this lawsuit to compel the Secretary to do so.

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[2] "C.R." refers to the clerk's record in the district court, filed in lieu of an appendix in the court of appeals.

[3] Assistance was provided to Iowa farmers under the following federal programs:

Farmers Home Administration (FmHA) "disaster emergency loans" were available under the Consolidated Farm and Rural Development Act, 7 U.S.C. 1961. In fiscal year 1983 (beginning October 1, 1982), FmHA made 8,771 such loans nationwide, totaling $565.9 million. Ninety of those loans, totaling $2.9 million, were made in Iowa. As of May 1984, when this suit was brought, 26,266 disaster emergency loans totaling more than $806 million had already been made nationwide for FY 1984 (beginning October 1, 1983), with 3,425 loans (totaling $79.6 million) going to Iowa (C.R. 23). Producers in all Iowa counties were eligible to apply for these loans.

"Economic emergency loans" were also available under 7 U.S.C. 1961. In FY 1983, FmHA provided no economic emergency loans.

As of May 1984, in response to the drought, 2,247 such loans ($281.7 million) had been made nationwide, with 157 loans (totaling almost $18 million) in Iowa (C.R. 23). All Iowa producers were also eligible to apply for these loans.

The Department of Agriculture provided additional relief to Iowa farmers participating in federal commodity production adjustment and price stabilization programs. In exchange for various benefits under these programs (in the form of cash payments, loans, or commodity payments-in-kind), participating producers are normally required to divert to conservation use a specified percentage of the farm's historical acreage base, and the land devoted to conservation use cannot normally be used for grazing or the production of other crops (7 U.S.C. 1444(e)(4)). Due to the 1983 drought, however, this requirement was relaxed so that producers in certain areas (including 85 counties in Iowa) were permitted to graze and forage their own conservation-use acreage. In addition, they continued to receive federal payments or other benefits for not planting crops on the land, and not incurring production costs (C.R. 23-25).

Iowa farmers were also permitted to purchase federal corn supplies at substantially below price support or market rates under the Emergency Feed Assistance Program, 7 U.S.C. 1427, a program which is normally available only to farmers who qualify for FmHA loan assistance. However, in order to avoid delay in providing aid to the farmers most in need, the Secretary waived the loan-eligibility requirement and provided reduced-price feed grain to all otherwise eligible farmers in designated disaster areas. All farmers and ranchers in Iowa were eligible to purchase feed corn through this program. By May 1984 they had purchased 2.6 million of some 19 million bushels sold nationwide (C.R. 20-22).

Finally, federal crop insurance was available to Iowa feed grain producers through the Federal Crop Insurance Corporation (FCIC) (C.R. 22-23). See 7 U.S.C. 1501 *et seq.* The FCIC may pay up to 30% of the producer's premium. For the 1983 crop year, Iowa producers purchased insurance for many crops, including corn, wheat, oats and soybeans (C.R. 22-23). Crop insurance indemnities for these commodities in Iowa in 1983 totaled almost $40 million, including $32.05 million for corn. Those crop insurance payments were more than four times greater than similar payments for the 1982 crop year (*ibid.*).

The programs involved (all of them administered by the Commodity Credit Corporation (CCC), an arm of the Department of Argiculture) were: (1) the discretionary portion of the SDPP, 7 U.S.C. 1444d(b)(2)(D),[4] (2) the Emergency Feed Program, 7 U.S.C. 2267, (3) the Livestock Feed program, 7 U.S.C. 1427, (4) the Disaster Reserve Program, 7 U.S.C. 1427a, and (5) 7 U.S.C. 1851, a statute providing for the orderly disposal of stockpiled grain. In responding to Iowa's request for implementation of these programs, the Secretary pointed out that significant other federal assistance was already being provided to Iowa producers (see Complaint Exh. C, Letter from Acting Secretary Richard E. Lyng to Rep. Tom Harkin (Mar. 16, 1984)). With specific reference to the request for discretionary SDPP payments, the Secretary stated (*ibid.*):

> Since it is our policy to support the principle and the mandate from Congress that the extended crop insurance program replace disaster payments, we do not plan to exercise our discretionary authority to implement the Special Disaster Payment Program at this time. To do otherwise would only undermine and defeat the Congressionally dictated crop insurance program.

3. The district court held (App., *infra,* 24a-33a) that the broad statutory language authorizing the programs committed implementation decisions to the Secretary's unreviewable discretion. See 5 U.S.C. 701(a)(2). The court pointed out (App., *infra,* 31a-32a (footnote omitted)) that in each of the five programs:

> Congress used permissive language, allowing the Secretary to set the terms of implementation he determined to be in the national interest. This broad dele-

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[4] Since federal crop insurance was available in all Iowa counties in 1983, the mandatory portion of SDPP is not involved in this case.

> gation of authority by Congress leaves the Court with little, if any, standard for reviewing the Secretary's failure to implement the programs.

In addition, the court noted (App., *infra,* 32a) that several "[p]ragmatic considerations" compelled the conclusion that the Secretary's decision is not reviewable:

> Throughout the years Congress has authorized a broad range of discretionary assistance programs to deal with agricultural disasters. Recognizing that the Secretary possesses expertise in agricultural affairs and the means of evaluating the everchanging national agricultural conditions, Congress often vested discretion in the Secretary to determine whether to implement such programs. In deciding which programs to implement and the areas or individuals that are entitle[d] to assistance, the Secretary must consider the level of relief required, the national and international ramifications of implementation, the level of relief afforded by programs already implemented, and various other economic and managerial issues. For the Court to fairly and fully review the discretionary decision of the Secretary, all of the factors that entered into the decision would have to be brought before the Court, if that would be possible.

The court stated that it could not "properly review the Secretary's determinations—which were certainly based on data gathered from national and international sources—and then limit[] its decision whether the Secretary acted arbitrarily to the situation presented in several southeast Iowa counties" (*ibid.*); "the Secretary must look far beyond the particular local situation in exercising his discretion," weighing the ramifications of his decision on national and international concerns, the budgetary impact, and other factors not susceptible to judicial review (*id.* at 33a). Accordingly, the district court dismissed the complaint.

4. The court of appeals unanimously affirmed with regard to the Livestock Feed Program (LFP), 7 U.S.C. 1427, and the Emergency Feed Program (EFP), 7 U.S.C. 2267.[5] The court concluded (App., *infra,* 2a-3a n.1) that it was "unable to consider [respondents'] request for an injunction under [the LFP and the EFP]" "[b]ecause issuance of benefits under" those programs is administered through the Commodity Credit Corporation (CCC). Since injunctions against the CCC are prohibited by statute,[6] the court would be "unable to authorize the relief requested by [respondents], even if it were warranted" (*ibid.*).

The panel was divided, however, on the discretionary SDPP claims. The majority concluded first that even though the discretionary SDPP is administered through the CCC, the anti-injunction statute did not bar relief because the court deemed itself to have jurisdiction to require the Secretary to "fram[e] * * * regulations" implementing the discretionary SDPP "without necessarily requiring the Secretary to make payments or 'carry out the program' " (App., *infra,* 3a n.1, citing *Mitchell* v. *Block,* 551 F. Supp. 1011, 1015 (W.D. Va. 1982)).

Invoking a presumption in favor of judicial review (*Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971)), the majority then concluded that there was enough " 'law to apply' " to enable a court to review the Secretary's decision not to make discretionary SDPP

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[5] The court also affirmed the district court's holding that the State of Iowa lacked standing. Since there was no question as to the standing of the intervenors (eight individual farmers), the court considered the LFP, EFP and SDPP claims. On appeal, respondents had abandoned their claims concerning the Disaster Reserve Program, 7 U.S.C. 1427a, and the disposal of stockpiled grain under 7 U.S.C. 1851.

[6] 15 U.S.C. 714b(c) provides that the CCC "[m]ay sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property."

payments to Iowa farmers. The court noted (App., *infra,* 4a) that the statute provides that where crop insurance is available and mandatory cash disaster payments are therefore not available (see 7 U.S.C. 1444d(b)(2)(A)-(C)), the Secretary nevertheless "may make disaster payments * * * whenever [he] determines" that "(i) as the result of * * * natural disaster, * * * farm[ers] have suffered substantial losses of production * * * [;] (ii) * * * other [federal assistance programs] * * * are insufficient to alleviate such economic emergency[; and] * * * (iii) additional assistance must be made available * * * to alleviate the economic emergency." See 7 U.S.C. 1444d(b)(2)(D)(i)-(iii).

Applying its earlier decision in *Allison* v. *Block,* 723 F.2d 631 (8th Cir. 1983),[7] to this case, the majority concluded (App., *infra,* 9a (footnote omitted)) that "the [SDPP] presents a straightforward case which compels judicial review of agency inaction":

> Despite the fact that the statute specifies three criteria for determining the inadequacy of federal crop insurance, the Secretary has deliberately taken no steps to implement proper procedures to protect applicants from potential abuses of discretion under the statute. Moreover, the criteria presuppose findings about the inadequacy of crop insurance; as in *Allison,* the criteria suggest a "prima facie standard of eligibility

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[7] In *Allison,* the court held that the Secretary must implement the loan deferral provision of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1981a. The court concluded that the legislative history of Section 1981a showed that Congress expected the Secretary to promulgate rules similar to those he had previously issued under an analogous provision of the National Housing Act. Accordingly, the *Allison* court required the Secretary to establish uniform procedural and substantive standards for Section 1981a. *Allison* was decided prior to this Court's decision in *Heckler* v. *Chaney,* No. 83-1878 (Mar. 20, 1985).

> for relief," [723 F.2d] at 637, yet without substantive elaboration by the Secretary, the criteria and the relief program become no more than "an empty procedural shell," and the clear intent of Congress to establish a program is thwarted. We also observed that, as was the case in *Allison,* the legislative history of this measure relies on the word "program," which becomes nonsensical unless the Secretary promulgates procedural and substantive standards under which disaster assistance can be disbursed. S. Rep. No. 126, 97th Cong., 1st Sess., 111, *reprinted in* 1981 U.S. Code Cong. & Ad. News 2076. Given the clear guidance of the statute, its supporting materials and case law, then, we find ample law to apply and we reject the district court's suggestion that judicial review was foreclosed by an absence of law.

Stating that (App., *infra,* 10a (emphasis added)) "when Congress has created a *program which contemplates that such payments will be made* in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress," the majority remanded the case to the district court to "promptly * * * consider [respondents'] requests for preliminary and permanent injunctive relief *compelling the Secretary to implement the SDPP*" (*id.* at 16a-17a (emphasis added)).[8]

Judge Fagg dissented from the SDPP holding because the majority opinion "impermissibly diminishes the discretion granted the Secretary by law" (App., *infra,* 18a). Congress's primary goal in establishing the entire SDPP was "to 'provide for a *limited continuation* of disaster

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[8] On remand, the district court directed the Secretary to promulgate final regulations implementing the discretionary SDPP by June 1, 1986.

payments to cover those parts of the country into which Federal crop insurance has yet to expand' " (*id.* at 19a, quoting S. Rep. 97-126, 97th Cong., 1st Sess. 76 (1981) (emphasis added)). Congress therefore provided that the Secretary "shall" make cash disaster payments where federal crop insurance is not available, under the "reasonably well-defined [mandatory SDPP] relief program" which leaves "little * * * to the Secretary's discretion" (App., *infra,* 19a). "[I]n sharp contrast," Judge Fagg noted, Section 1444d(b)(2)(D) provides that the Secretary "may" make payments where crop insurance is available, but presents no meaningful, judicially-manageable standards against which to evaluate the agency's action for abuse of discretion (App., *infra,* at 19a-21a, citing *Heckler* v. *Chaney,* No. 83-1878 (Mar. 20, 1985)). The effect of the majority opinion was to: "view[] the presence of the criteria under which the Secretary *may* take some action as also establishing that the Secretary *must* take some action. Such a conclusion ignores the plain language of the SDPP" (App., *infra,* 21a (emphasis in original)).

Finally, Judge Fagg disagreed with the ruling that the anti-injunction statute, 15 U.S.C. 714b(c), posed no bar to the relief respondents sought under the SDPP (App., *infra,* 22a-23a). He observed that "although implying that its decision is not injunctive in nature, the court effectively enjoins the Secretary (and thus the CCC) and compels him to make available a program the implementation of which has been left entirely within his discretion" (*ibid.*).

The Secretary's petition for rehearing en banc was denied by vote of 4-4 (with one judge abstaining) (App., *infra,* 35a).[9]

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[9] Respondents have filed a separate petition for a writ of certiorari (No. 85-1481) challenging the court of appeals' rulings that the state lacked standing and that all claims under the LFP and EFP programs are barred by the anti-injunction statute. We will respond to the petition in No. 85-1481 in a separate submission.

REASONS FOR GRANTING THE PETITION

The court of appeals has misread 7 U.S.C. 1444d(b)(2)(D). If the Secretary makes certain predicate determinations, the statute permits him to make disaster payments to producers who are eligible for federal insurance; it does not compel him either to make the threshhold findings or to provide assistance in any particular situation. The court of appeals, however, incorrectly equated a statute that authorizes the agency to provide a certain form of assistance with one that requires such action. See *Batterton* v. *Francis,* 432 U.S. 416, 431 (1977). This Court has expressly disapproved the sort of judicial legislating indulged in here: imputing standards and reviewing agency action where Congress provided for neither. See *Block* v. *Community Nutrition Institute,* 467 U.S. 340 (1984); *Heckler* v. *Chaney,* slip op. 8-9; see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843 & n.11 (1984).

If allowed to stand, the decision below would have serious adverse effects. It would displace Congress's preference for a system of crop insurance with an expanded system of cash payments that the Department of Agriculture estimates would run into tens of millions of dollars annually, and potentially into the billions. By compelling the Secretary to create a regulatory scheme Congress never intended, it would hinder his ability to act with the swiftness and flexibility that emergencies demand. And, by compelling potentially huge federal outlays to the nation's largest industry for unpredictable natural disasters, the decision subverts Congress's longstanding efforts to craft a fiscally responsible and economically sound farm policy that meets the needs of both the agricultural industry and the nation as a whole. Accordingly, certiorari is clearly warranted.

1. The statutory language demonstrates Congress's intent that crop insurance be the principal means of disaster relief. Thus, 7 U.S.C. 1444d(b)(2)(C) establishes the general rule that where crop insurance is available, SDPP payments are prohibited.[10] In areas of the country where such insurance is not yet available, the mandatory portion of SDPP requires that the Secretary "shall" make payments to producers if he determines that natural conditions prevent them from planting or harvesting. 7 U.S.C. 1444d(b)(2)(A) and (B). The statute specifically recites when it is to be applied, issues a plain directive to the Secretary, and itemizes how payments are to be calculated.[11] It also expressly contemplates that regulations will be issued and the Secretary has done so. See 7 C.F.R. 713.105. Since the mandatory portion does not apply where federal crop insurance is available, and such insurance was available in all counties in Iowa in 1983, that portion of SDPP is not involved here.

The discretionary portion of SDPP is clearly distinct. It is a limited exception to the statutory rule that cash payments are barred to producers eligible for crop in-

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[10] 7 U.S.C. 1444d(b)(2)(C) provides that:

> Producers on a farm shall not be eligible for disaster payments under this paragraph if crop insurance is available to them under the Federal Crop Insurance Act [7 U.S.C. 1501 et seq.] with respect to their feed grain acreage.

[11] "[T]he Secretary shall make a prevented planting disaster payment to the producers on the number of acres so affected but not to exceed the acreage planted to feed grains for harvest * * * in the immediately preceding year, multiplied by 75 per centum of the farm program payment yield established by the Secretary times a payment rate equal to 33 1/3 per centum of the established price for the crop" (7 U.S.C. 1444d(b)(2)(A)). "[T]he Secretary shall make a reduced yield disaster payment to the producers at a rate equal to 50 per centum of the established price for the crop for the deficiency in production below 60 per centum for the crop" (7 U.S.C. 1444d(b)(2)(B)).

surance. Thus, 7 U.S.C. 1444d(b)(2)(D) permits the Secretary ("may make disaster payments") to provide such assistance whenever he determines that:

> (i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other non-conserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;
> (ii) Federal crop insurance indemnity payments and other forms of assistance made available by the Federal Government to such producers for such losses are insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the Federal crop insurance program; and
> (iii) additional assistance must be made available to such producers to alleviate the economic emergency.

The discretionary program thus creates a three-step procedure before assistance may be provided: first the Secretary makes the determinations specified in Subsections (i), (ii) and (iii), then he decides whether to implement the program for a given emergency, and finally he decides whether or not to make payments to particular farmers. Unless the predicate determinations are made, the next steps are not reached.

In contrast to the mandatory provisions in Subsections (A) and (B), the discretionary portion of the statute is not written in the imperative, does not direct the Secretary to make payments according to a set formula, and does not expressly refer to standards to be established by the Secretary. Rather, Congress enacted the discretionary SDPP in terms similar to those used in describing the President's authority to declare emergencies and major

disasters that warrant federal assistance (see 42 U.S.C. 5122, 5141). In so doing, Congress created a power and authorized the exercise of that power in the discretion of the Secretary; it has not *required* any action. As the differences between the two portions of SDPP demonstrate, Congress well knows how to make action compulsory. It has not done so here.

In brushing aside these clear distinctions, the court of appeals apparently confused the mandatory and discretionary portions of SDPP. This confusion is manifest in the court's instruction that on remand the district court "should note especially the imperative language in the statute ('shall' make disaster payments)" (App., *infra,* 17a); see also *id.* at 10a ("when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress").

2. The legislative history and structure of the SDPP also show an intent to confide to the Secretary the sole discretion to determine when his statutory authority will be exercised. The SDPP for feed grains was enacted as part of the Agriculture and Food Act of 1981, Pub. L. No. 97-98, 95 Stat. 1213 *et seq.*[12] In passing ~~comprehensive~~

[12] Prior to 1981, mandatory cash disaster assistance payments were available in certain circumstances for producers of wheat, feed grains, upland cotton and rice. See S. Rep 97-126, 97th Cong., 1st Sess. 27-29 (1981). In 1981, Congress restricted the mandatory authority to areas where crop insurance was not available and created discretionary authority for cash disaster payments to producers of feed grains (7 U.S.C. 1444d(b)(2)), upland cotton (7 U.S.C. 1444(g)(4)), rice (7 U.S.C. 1441(i)(3)) and wheat (7 U.S.C. 1445b-1(b)(2)). S. Rep. 97-126, *supra,* at 30-31. For all these crops, as for the feed grain SDPP at issue here, the 1981 Act authorized cash payments only where crop insurance was not available, or where the Secretary determined that cash payments were necessary because crop insurance and other federal assistance proved inadequate. *Ibid.* In addition, for the 1983

comprehensive legislation Congress sought to promote market solutions to farm problems and to reduce the expense of federal farm programs. See S. Rep. 97-126, 97th Cong., 1st Sess. 2, 3, 10, 24-28 (1981).[13] Central to this effort was the nationwide all-crop, all-risk, federally-subsidized crop insurance program (7 U.S.C. 1501 *et seq.*), that was established in 1980. To encourage participation in the crop insurance program and for budgetary reasons, Congress limited other forms of federal relief with the aim of eliminating some of them altogether. Thus, certain formerly mandatory commodity assistance programs (*i.e.*, the Livestock Feed Program, 7 U.S.C. 1427, and the Disaster Reserve Program, 7 U.S.C. 1427a, under which federal grain could be purchased by distressed farmers at reduced prices) became "discretionary with the Secretary"[14] and would only be "continu[ed] * * * at the option of the Secretary."[15]

Congress was especially alert to the budgetary implications of continued cash disaster assistance payments. The Senate report observed (S. Rep. 97-126, *supra*, at 75) that

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crop of feed grain at issue here, the statute provided the further limitation that producers would not be eligible for payments unless they complied with acreage limitations and set aside and diversion programs (7 U.S.C. 1444d(e)(1)(B)).

[13] The Senate Report (at 3) states that:

> The legislation adopted by the Committee reflects the fact that 1981 was the first year in memory in which severe budgetary constraints were such a prominent factor in the consideration of farm policy. The Committee went to great lengths to fashion a farm bill that would not result in unacceptably large Federal outlays. For the most part, the Committee was successful in maintaining a reasonable farm program without burdening the American taxpayer unnecessarily.

[14] See H.R. Conf. Rep. 97-377, 97th Cong., 1st Sess. 188, 194 (1981).

[15] 127 Cong. Rec. 23489 (1981)(Rep. Bedell).

"[t]he Federal Government's current disaster payments program amounts to free crop insurance." Moreover, the pre-existing program had "the most glaring fault" of encouraging production on marginal lands with reduced yield capacities, resulting in "undesirable conservation practices" and increased agricultural surpluses (thus adding to the costs of federal conservation and price support programs). *Id.* at 76. Congress therefore sought to replace that regime with a nationwide federal crop insurance program. *Ibid.* In designing the new program, Congress recognized that the continued availability of cash assistance "would detract from the number of farmers who otherwise would purchase" federal crop insurance, and premiums would climb for those who did buy it. *Ibid.* Only because of "the unpredictability inherent in weather," and in the availability of appropriations for the crop insurance program, did Congress deem it "prudent to provide for a *limited* continuation of disaster payments *to cover those parts of the country into which Federal crop insurance has yet to expand.*" *Ibid.* (emphasis added).

As this history shows, Congress's clear intent was to reduce, and eventually to end, direct cash disaster assistance; the limited provision of mandatory payments under Sections 1444d(b)(2)(A) and (B) was plainly transitional only. In Subsection (D), which originated in the version of the bill proposed by Senator Huddleston, Congress granted the Secretary the additional *option* to provide cash payments notwithstanding the availability of crop insurance and other federal assistance, "if it is determined that (1) the losses incurred have created an economic emergency; (2) Federal crop insurance indemnities are insufficient to alleviate the economic emergency; and (3) additional assistance must be available in order to alleviate the economic emergency" (S. Rep. 97-126, *supra,*

at 27, 77-78).[16] Thus, these three findings are not automatic triggers for a mandatory duty, as the court of appeals held, but rather conditions which must be met before the Secretary may even consider using his discretion under the Act. These factors are not further defined, and the Senate report specifically pointed out (*ibid.*) that "the bill * * * does not specify the emergency situations or transitionary [*sic*] authority."[17]

At no time did Congress, or even any member, suggest that the Secretary was *required* to use his authority in any

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[16] Senator Heflin offered an amendment, which was accepted, allowing the Secretary to provide discretionary payments under Subsection (D) where crop insurance was insufficient due to "transitional problems attendant to the Federal crop insurance program" (S. Rep. 97-126, *supra,* at 78).

[17] The report noted the following examples provided by Senator Heflin of "situations in which the Secretary could reasonably be expected to implement" the discretionary SDPP (S. Rep. 97-126, *supra*, at 78):

> (1) the Federal crop insurance policy excludes coverage for the disaster risk that caused the loss; (2) there was a lack of understanding of the crop insurance program among producers affected by the disaster; (3) the crop insurance program was not adequately sold in the area affected by the disaster, or the Federal Crop Insurance Corporation's educational efforts were inadequate; or (4) the Federal Crop Insurance Corporation used an inaccurate actuarial basis so that a producer affected by the disaster was unable to obtain coverage adequate to protect his crop sufficiently. There could be other, similar situations that may arise, and the examples given are not meant to be inclusive.

The majority of the court of appeals cited this passage as the "legislative materials" that guided its review of the Secretary's decision. Senator Heflin's suggestions, which address only a narrow aspect of the Secretary's broad authority to act, were never codified and thus represent the views of only one member of Congress. This is the sort of "legislative intention" which, "without more, is not legislation" and is therefore not binding on agency action. *Train* v. *City of New York,* 420 U.S. 35, 45 (1975); *Weinberger* v. *Rossi,* 456 U.S. 25, 35 n.15 (1982) ("[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"). In any event, Senator Heflin's examples do not describe the situation in this case.

given set of circumstances. It therefore would be a gross distortion of the language, legislative history and statutory scheme to construe Subsections (C) and (D) as expressing congressional *expectation* that the Secretary would be required to implement the program in a particular situation. To the contrary, Subsections (C) and (D) signal Congress's expectation that cash payments ordinarily will not be made where crop insurance is available.

3. This Court has held that in the absence of judicially-manageable legislative standards—*i.e.*, objective criteria against which a court can determine if the agency has carried out the legislative intent—the matter is "a decision 'committed to agency discretion by law' " (*Heckler* v. *Chaney*, slip op. 13, quoting 5 U.S.C. 701(a)(2)).[18] Where Congress has not given precise

[18] While there is a strong presumption in favor of judicial review of administrative action under the Administrative Procedure Act, 5 U.S.C. (& Supp.II) 701 *et seq.* (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 410), judicial review is not available where it is prohibited by statute (5 U.S.C. 701(a)(1)), or where "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). In addition to the arguments made above, 7 U.S.C. 1429 provides that "[d]eterminations made by the Secretary under [the Agriculture Act of 1949, as amended, which contains the SDPP] shall be final and conclusive," and the legislative history evidences an intent to preclude judicial review. *E.g.*, 95 Cong. Rec. 13779 (1949) (remarks of Senator Williams); S. Rep. 1130, 81st Cong., 1st Sess. (1949).

Under Section 701(a)(2), action is committed to agency discretion, and not reviewable, for example, "where 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (*Overton Park*, 401 U.S. at 410 (citation omitted)). This Court has also ruled that action is committed to agency discretion if that appears to be the intent of Congress under the particular legislative scheme (*Block* v. *Community Nutrition Institute*, 467 U.S. at 349, 351 (quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970)):

> The presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent * * * [or] by inferences of intent drawn from the statutory scheme as a whole. * * * * * [T]he

guidance for agency action, it has implicitly delegated the responsibility of filling the gaps to the agency; "[i]n such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" (*Chevron,* 467 U.S. at 844 (footnote omitted)). In this case, the Secretary has determined that the statute does not require him to implement the discretionary SDPP program in a given agricultural emergency and—in light of the other forms of assistance and insurance made available—he has decided not to use his discretionary SDPP authority for the 1983 drought in Iowa. That interpretation of his statutory powers is not unreasonable or impermissible based on the language or legislative history of the SDPP and therefore must be upheld. See, *e.g., United States* v. *Riverside Bayview Homes, Inc.,* No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron,* 467 U.S. at 842-845 & nn. 11-14; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District,* 467 U.S. 380, 389-390 (1984).

The Secretary's interpretation is particularly compelling here because, as the district court found, pragmatic considerations inherent in the decisionmaking process also preclude meaningful judicial review. It is the nature of emergencies to be unpredictable—in number, frequency, cause, severity, scope and duration—so it is impractical to prescribe the option or combination of options the Secretary must implement in a given situation. For the Secretary to bind himself in advance to a specific response would run counter to Congress's intent that the government have flexibility to deploy assistance most effectively in emergency conditions, while retaining the resiliency and resources needed to respond to future emergencies.

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presumption favoring judicial review [is] overcome [] whenever the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme."

4. By effectively transforming an optional assistance program into a mandatory program, the decision below may have an enormous fiscal impact. Once the Secretary is compelled to issue regulations for determining eligibility for SDPP benefits, it is hard to see how he could ever deny benefits to someone who appeared to "qualify"—at least without substantial litigation. That is a mandatory program; it is not what Congress intended. Given the frequency of natural disasters causing delayed planting or reduced harvests in at least some part of the nation every year, the Department of Agriculture estimates that any principled attempt to comply with the court of appeals' ruling will result in disaster payments of tens of millions of dollars annually and, in particularly bad years, could reach into the billions of dollars.

It is plain that Congress, which sought to diminish the cash disaster assistance program, did not intend to authorize such enormous cash outlays of unpredictable size.

5. Finally, Congress has specifically prohibited the relief sought by respondents. 15 U.S.C. 714b(c) precludes the issuance of any "attachment, injunction, garnishment, or other similar process" against the Commodity Credit Corporation (CCC). Section 714b(c) was enacted to guard against "the possible detriment to the Government through hindrance or obstruction of the Corporation's operations, if it were made amenable to such processes" (S. Rep. 1022, 80th Cong., 2d Sess. 10 (1948)). Respondents have demanded an injunction compelling the Secretary to implement a program for benefits under the discretionary SDPP, which is administered by the CCC (7 U.S.C. 1444d(h)). The court of appeals agreed that this provision prevented it from awarding the relief respondents requested under two other relief programs administered by the CCC. The court distinguished SDPP, however, concluding that it had "jurisdiction to require

the Secretary to promulgate and implement regulations * * * without necessarily requiring the Secretary to make payments or 'carry out the program' " (App., *infra*, 2a-3a n.1, quoting *Mitchell* v. *Block*, 551 F.Supp. 1011, 1015 (W.D.Va. 1982)).

The court's distinction is elusive, as Judge Fagg's dissent points out.[19] Moreover, respondents requested precisely the same relief under all three programs, so the jurisdictional issue must also be the same as to each program. Nonetheless, the court appears to have created a distinction based on the relief it ultimately decided to award under SDPP. It should have looked instead only at the relief sought in the complaint (para. VII(2)), *i.e.* "[t]hat the Court issue both a preliminary and permanent injunction compelling the defendants to exercise their discretion and implement the disaster relief programs described in this Complaint." The obvious thrust of the complaint is that disaster benefits are sought; those benefits are administered by the CCC and although the CCC is not a named party in the case, an injunction providing the relief requested would violate Section 714b(c) by compelling the CCC to take action.

The point is underscored by the court of appeals' description of the proceeding to take place on remand (App., *infra*, 16a-17a (emphasis added)): "the district court should promptly hold a hearing to consider [respondents'] requests for preliminary and permanent injunctive relief *compelling the Secretary to implement the SDPP*." Because such an injunction would necessarily cause the CCC to act, it is barred by Section 714b(c).

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[19] In fact, the distinction is nonexistent. Compare, App., *infra*, 2a-3a n.1 (anti-injunction statute does not apply because the Secretary will not necessarily be required to " 'carry out the program' ") with *id.* at 16a-17a (remand for district court to consider injunction "compelling the Secretary to implement the SDPP").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2278

THE STATE OF IOWA, EX REL.
THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA,
APPELLANT,

DANNY AND CARENE GETTLER, H. S. AND MAXINE LOVETT,
ROBERT S. AND HOPE MENDENHALL AND
TOM AND LINDA WATKINS,
APPELLANTS

v.

JOHN R. BLOCK, SECRETARY OF THE UNITED STATES
DEPARTMENT OF AGRICULTURE; THE UNITED STATES
DEPARTMENT OF AGRICULTURE, AN AGENCY OF THE
UNITED STATES GOVERNMENT,
APPELLEES

Appeal from the United States District Court
for the Southern District of Iowa

Submitted: December 14, 1984

Filed: August 15, 1985

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The State of Iowa (State) and several individual farmers (plaintiffs-intervenors in the district court) appeal from the district court's dismissal of their motion for a pre-

liminary injunction to compel John Block, Secretary of the United States Department of Agriculture (Secretary), to implement three federal agricultural disaster relief programs. For reversal, the State and the farmers argue that the district court erred, first, in declining to accept subject matter jurisdiction on the ground that the Secretary's decisions under the discretionary programs are not reviewable in the courts; second, in approving the Secretary's actions according to "pragmatic factors"; and, third, in finding that the State lacked standing to sue as *parens patriae* on behalf of its citizens. Although we affirm the district court's finding regarding the State's lack of standing, we believe the district court erred in declining to accept subject matter jurisdiction of one of the programs. Accordingly, we reverse and remand for additional proceedings in accordance with this opinion.

I. BACKGROUND.

In 1983, a devastating drought parched the agricultural midwest, including southern Iowa. Farm output fell to a fraction of its ordinary level and many farmers skirted the brink of financial ruin. To mitigate this disaster, Iowa's governor requested that the Secretary implement several discretionary federal disaster relief programs, which the Secretary declined to do. For purposes of this appeal, these programs included the Special Disaster Payment Program (SDPP), 7 U.S.C. § 1444d(b)(2) (1982); the Livestock Feed Program (LFP), 7 U.S.C. § 1427 (1982) (as implemented in 7 C.F.R. §§ 1475.1-17 (1982)); and the Emergency Feed Program (EFP), 7 U.S.C. § 2267 (1984) (as implemented in 7 C.F.R. §§ 1475.50-68 (1984)).[1]

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[1] The appellees properly point out that the enabling legislation of the Commodity Credit Corporation (CCC) precludes issuance of an injunction against the Corporation. 15 U.S.C. § 714b(c). ("The Corporation—* * * (c) may sue and be sued, but no attachment, injunc-

When the Secretary refused assistance under these programs, the State of Iowa filed an action in federal court seeking an injunction to compel him to implement the programs. After the action had commenced, six Iowa farm couples (who suffered under the drought and would be eligible for benefits under these programs) intervened as plaintiffs in the action. The district court heard argument on the motion for preliminary injunction and on the motion to dismiss and dismissed the action, finding that the State had no standing to litigate either on its own behalf or as *parens patriae*. The district court also found that it had

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tion, garnishment or other similar process, mesne or final, shall be issued against the Corporation or its property.") Because issuance of benefits under the LFP, 7 U.S.C. § 1427, is administered under the auspices of the CCC, we are unable to authorize the relief requested by appellants, even if it were warranted. Similarly, the EFP's implementing legislation provides that "[t]he Secretary shall carry out the program * * * through the Commodity Credit Corporation." 7 U.S.C. § 2269(f). Accordingly, we are unable to consider appellants' request for an injunction under these statutes.

The SDPP, however, presents a different jurisdictional case. We believe that this Court has jurisdiction to require the Secretary to promulgate and implement regulations because as we note in IIB, the framing of regulations fulfills Congress's intent under the SDPP without necessarily requiring the Secretary to make payments or "carry out the program." *See Mitchell v. Block*, 551 F. Supp. 1011, 1015 (W.D. Va. 1982).

The appellees also argue that judicial review is precluded by 7 U.S.C. § 1429, which provides, in pertinent part, that "[d]eterminations made by the Secretary under this Act shall be final and conclusive." The D.C. Circuit rejected this interpretation in *Gonzalez v. Freeman*, 334 F.2d 570, 575 (D.C. Cir. 1964), in which it held that agency action "could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect. * * * We find no such intent reflected in the statute." Based on our reading of section 1429, as well as of the texts and legislative history of the SDPP, we agree and decline to immunize the Secretary in this case under the SDPP statute.

no subject matter jurisdiction because the statute's broad grant of authority left the courts little or no law on which to review the Secretary's inaction. Finally, the district court also cited pragmatic considerations—deference to agency expertise—which required dismissal. The State and the intervenors appeal.

II. SUBJECT MATTER JURISDICTION.

In determining that it lacked subject matter jurisdiction to consider the case at bar, the district court relied on a narrow exception to the grant of judicial review established in the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2). In pertinent part, that section provides for judicial review of agency action "except to the extent that—* * * (2) agency action is committed to agency discretion by law." The Supreme Court has interpreted this section as applicable "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). After reviewing the applicable legal standards and the relevant legislative and administrative materials, we conclude that the district court erred in declining to accept subject matter jurisdiction based on this provision.

Initially, we examine relevant case law to determine the sources from which we might derive "law to apply." In *Overton Park*, the Supreme Court held that the "agency discretion" exception to judicial review is "very narrow" and applies only in "rare instances." *Id.* In that case, the Supreme Court followed a careful pattern as it reviewed the language of the statute in question and its legislative history. Elsewhere the Supreme Court has specified what materials constitute the proper subject of inquiry in this type of case: "Whether and to what extent a particular statute precludes judicial review is determined not only

from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute*, 81 L.Ed.2d 270, 275-76 (1984). Accordingly, we now turn to these legislative materials.

A. The SDPP Statute and Supporting Legislative Materials.

The Special Disaster Payments Program (SDPP), which is without implementing regulations, presents sufficient legislative materials to assist reviewing courts. Under 7 U.S.C. § 1444d(b)(2), the Secretary "shall" make disaster payments to farmers on farms which are not covered by the Federal Crop Insurance Act (FCIA) (7 U.S.C. § 1501 *et seq.*) if the Secretary determines either that a natural disaster has prevented planting of feed grains or that a natural disaster has reduced the harvest of feed grains. 7 U.S.C. § 1444d(b)(2)(A) & (B). On farms that are covered by the FCIA, the Secretary "may make disaster payments" whenever he determines: 1) that, as a result of natural disaster, farmers have sustained "substantial losses of production"; 2) that other federal assistance programs are insufficient to alleviate the economic emergency; and 3) that "additional assistance must be made available" to eliminate the economic emergency. 7 U.S.C. § 1444d(b)(2)(D)(iii).

The legislative history of the bill is also illuminating in that it addresses the interaction of SDPP with the Federal Crop Insurance Program. Although the statute "does not specify the emergency situations" in which assistance under SDPP would be provided, Senator Heflin provided "some idea of the situations in which the Secretary could reasonably be expected to implement the disaster payments program." The list of examples, which was "not meant to be inclusive," included situations in which:

> (1) the Federal crop insurance policy excludes coverage for the disaster risk that caused the loss; (2) there was a lack of understanding of the crop insurance program among producers affected by the disaster; (3) the crop insurance program was not adequately sold in the area affected by the disaster, or the Federal Crop Insurance Corporation's educational efforts were inadequate; or (4) the Federal Crop Insurance Corporation used an inaccurate actuarial basis so that a producer affected by the disaster was unable to obtain coverage adequate to protect his crop sufficiently.

S. Rep. No. 126, 97th Cong., 1st Sess. 78, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1965, 2042-43.

The appellants also direct our attention to a General Accounting Office (GAO) Report on USDA disaster aid payments under the Agriculture and Food Act of 1981. That report noted that the Act vests substantial discretionary authority in the Secretary to make these aid payments, yet it concluded that "USDA's use of this discretion should be based on objective criteria. However, USDA has not developed objective criteria to be used in awarding special disaster payments. This lack of criteria may result in subjective or inconsistent application of the Act." United States General Accounting Office, *Report to the Honorable Berkley Bedell, USDA Needs Objective Criteria for Awarding Special Disaster Payments* (Nov. 2, 1982) 15.

B. Application of the Law.

Having reviewed the relevant legislative materials under the SDPP, we next review analogous case law to assist us in evaluating the statutes we have discussed. We find our recent decision in *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), to be highly instructive. In that case, we considered

the Secretary's failure to implement a program entirely, not simply his failure to grant aid in a particular case.[2] The Allisons, who had defaulted on Farmers Home Administration (FmHA) loans, sued the Secretary of Agriculture seeking a deferral of the foreclosure of their farm. The district court enjoined foreclosure on the Allisons' farm pending the Secretary's compliance with the deferral statute, 7 U.S.C. § 1981a (1982),[3] and we affirmed.

In *Allison*, as in this case, the Secretary argued that because section 1981a establishes no administrative procedural requirements nor substantive rights, the statute does not require any administrative action. *Id.* at 634. In rejecting this argument, we observed that the Secretary's authority to defer foreclosure under section 1981a was predicated on two actions by the borrower which implicate

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[2] We regard this fact as the essential point distinguishing the Supreme Court's recent decision in *Heckler v. Chaney*, 53 U.S.L.W. 4385 (Mar. 19, 1985), from *Allison* and the case at bar. In *Heckler*, the Court extended the language of 5 U.S.C. § 701(a)(2) (which excludes from judicial review "agency action * * * committed to agency discretion by law") to insulate from review the FDA's decision not to enforce the law proscribing unapproved use and misbranding of a drug. We believe that *Heckler's* consideration of an agency's decision not to enforce the law in a single instance presents an issue distinguishable from the Secretary's decision not to promulgate general regulations embodying the intent of Congress.

In addition, by analogy, the Court addresses and distinguishes the Secretary's inaction in the present case: "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under section 701(a)(2), and courts may require that an agency follow that law." *Id.* at 4388.

[3] Section 1981a provides:

> In addition to any of the authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured,

procedural protections. First, the borrower must specifically request relief and, second, he must show that, due to circumstances beyond his control, he is temporarily unable to make payments without unduly impairing his standard of living. *Id*. Close reading of these provisions of the statute and the legislative history revealed that Congress intended that the Secretary notify borrowers of the availability of relief and that he promulgate "a uniform policy under which borrowers can make the requisite request and prima facie showing." *Id*. (citing the statute and legislative history stressing, among other things, that the statute's objective was to "giv[e] people a chance" at remaining solvent in farming).

In addition to finding the need for these procedural standards, we also determined in *Allison* that section 1981a "also requires the development of substantive standards at the agency level to guide the Secretary's discretion in making individual deferral decisions." *Id* at 637. This conclusion was based upon the language in the statute which imposed upon the borrower the need to make a prima facie showing of circumstances beyond the farmer's

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or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period: Provided, That if the security instrument securing such loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.

7 U.S.C. § 1981a (1982).

control and the potential for an impaired standard of living. Finally, finding the terms "policy" and "program" in the statute, we concluded that "Congess surely would not consider an empty procedural shell, with no substantive measure of relief, to be a policy at all." *Id.*

With the methodology of the *Allison* case as our guide, we find that the Special Disaster Payments Program presents a straightforward case which compels judicial review of agency inaction. Despite the fact that the statute specifies three criteria for determining the inadequacy of federal crop insurance, the Secretary has deliberately taken no steps to implement proper procedures to protect applicants from potential abuses of discretion under the statute. Moreover, the criteria presuppose findings about the inadequacy of crop insurance; as in *Allison*, the criteria suggest a "prima facie standard of eligibility for relief," *id.* at 637, yet without substantive elaboration by the Secretary, the criteria and the relief program become no more than "an empty procedural shell," and the clear intent of Congress to establish a program is thwarted. We also observed that, as was the case in *Allison*, the legislative history of this measure relies on the word "program," which becomes nonsensical unless the Secretary promulgates procedural and substantive standards under which disaster assistance can be disbursed. S. Rep. No. 126, 97th Cong., 1st Sess., 111, *reprinted in* 1981 U.S. Code Cong. & Ad. News 2076. Given the clear guidance of the statute, its supporting materials and case law, then, we find ample law to apply and we reject the district court's suggestion that judicial review was foreclosed by an absence of law.[4]

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[4] As a separate issue on appeal, the appellants also challenge as erroneous the district court's reliance on "pragmatic considerations" which led it to defer to the Secretary's expertise and to conclude that implementation of these programs was not a proper subject for judi-

It is not the business of this Court to order the Secretary to make payments under the SDPP to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress.

III. STANDING.

The State of Iowa also challenges the district court's conclusion that the State lacked standing to pursue this

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cial review. In a recent case, this Court reviewed the pragmatic considerations which might influence the Court's decision:

> Among those pragmatic considerations are the nature of the administrative expertise involved, whether "there are discernible guidelines against which the agency decision may be measured," *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 579 (3d Cir. 1979), and whether the decision is the product of "political, military, economic, or managerial choices that are not really susceptible to judicial review." *Id.*

Story v. Marsh, 732 F.2d 1375, 1379 (8th Cir. 1984).

Although the resolution of this issue is implicit in our discussion of the district court's subject matter jurisdiction, reconsideration of the issue from this angle might be useful. It seems clear that the issue presented in this appeal does not turn on technical issues of the agency's substantive expertise. *Cf. Tuepker v. Farmer's Home Administration*, 708 F.2d 1329, 1332 (8th Cir. 1983) (Where Court found judicial review inappropriate, appellant had made "no claim alleging a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination' * * * [nor did he contend] that the FmHA made no appraisal of his farm.") Rather, as is clear from our discussion of the jurisdictional issue, we are met with the purely legal issue of whether there was law to apply in considering whether the agency acted contrary to Congress's intent in failing to implement the program at issue. No questions of agricultural economics arise on this consideration, and we are able to resolve the matter from a purely legal inquiry, which places the case within the courts' area of expertise.

litigation, either by virtue of its own interests, or under a *parens patriae* theory.[5] We consider each in turn.

A. The State's Standing to Sue on Its Own Behalf.

As the courts have frequently noted, standing requirements arise out of the Constitution and out of the courts' self-imposed prudential limitations on their own jurisdiction. *See Allen v. Wright*, 82 L.Ed.2d 556, 569 (1984). By thus carefully limiting the nature of the cases they hear, the federal courts "put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome," *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), and they "assure[] an actual factual setting in which the litigant asserts a claim of injury in fact." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). With this end in mind, we review the sources and nature of the standing limitation.

Under Article III of the Constitution, the judicial power of the United States is limited to the resolution of "cases" and "controversies." This familiar language has been interpreted by the Supreme Court "at an irreducible minimum" to require one seeking the courts' protection to " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' * * * and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge*, 454 U.S. at 472 (citations omitted).

The second category of self-imposed standing limitations are prudential principles which underscore the limitations embodied in Article III. Under these

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[5] The Secretary does not contest the standing of the individual farmers as plaintiffs-intervenors to the litigation. Accordingly, they may remain as named parties.

guidelines, the Court has required that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Moreover, under this principle, the federal courts should eschew "abstract questions" and "generalized grievances" which afflict a broad spectrum of the public. *Id.* at 499-500. Finally, the Court has drawn a requirement which links the party seeking relief to the provision on which he relies: the plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Organizations v. Camp,* 397 U.S. 150, 153 (1970).

The Supreme Court's most recent standing discussion acknowledges the lack of "precise definitions" in this area and warns that the standing determination must not be converted to a "mechanical exercise." *Allen v. Wright*, 82 L.Ed.2d 556, 570 (1984). The Court urged "careful judicial examination of a complaint's allegations" which might include the following questions:

> Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id.

Applying these tests to the facts in this case, we turn first to the constitutional issues of an injury in fact, its causal relationship to the defendant and the likelihood of redress by the remedy the appellants seek. In attempting to establish that it sustained an injury in fact, the State alleges that, but for the Secretary's implementation of these disaster relief programs, agriculture production will suffer, which will dislocate agriculture-based industries,

forcing unemployment up and state tax revenues down. As a result, the State will face increased responsibility for the welfare and support of its affected citizens while its available tax revenues are declining. The district court found that these injuries were "generalized grievances, shared by each citizen of Iowa," and it concluded that these injuries "fail to constitute distinct, palpable injuries to the State as a state."[6] We agree.

In reaching this conclusion, we follow the reasoning of the District of Columbia Circuit in *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert denied*, 429 U.S. 977 (1976), in which that Court denied standing to state officials seeking assistance from the Small Business Administration in rebuilding hurricane-ravaged businesses in Pennsylvania. That Court acknowledged that depleted tax revenues might be an actual economic harm to the State's interests, *id.* at 672, but it denied standing on the ground that this type of economic loss "is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." *Id.* It regarded the tax loss as "largely an incidental result of the challenged action" and required "some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged." *Id. See also Warth v. Seldin*, 422 U.S. 490, 504-07 (1975) (appellant failed to allege "an actionable causal relationship" between appellee's zoning practices and appellants' asserted injury).

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[6] Although this kind of injury does not establish the necessary kind of injury-in-fact for the State to sue on its own behalf, it is the type of injury on which the State might base a *parens patriae* action against a private defendant. For the reasons we outline below, however, *parens patriae* is also an inappropriate basis for standing where the State sues the federal government.

Conversely, the determination that the State of New York had standing to sue the federal Bureau of the Census in *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980), was based on a loss to the State more closely linked to the act in question. In that case, the State alleged that the census had undercounted residents of the City of New York, which had the effect of diluting the votes of city residents and distorting legislative reapportionment leading to underrepresentation of the city in Congress. The *Carey* Court found a "concrete harm" in dilution of votes and reduction of federal funds, and concluded that the injury was "traceable to the Bureau's actions." *Id.* at 838, citing *City of Camden v. Plotkin*, 466 F.Supp. 47-51 (D. N.J. 1978) (citizens who challenged census undercounts alleging loss of funds "established both an injury fairly traceable to the Census Bureau and a substantial probability" that court intervention will remedy the plaintiffs' injury). Likewise, in a variety of other cases, the Courts have found standing for the state when the link between the state and injury was more direct. *State of New York v. Heckler*, 719 F.2d 1191, 1195 (2d Cir. 1983) (State has the right to litigate regulation requiring notification of parents regarding child's use of contraceptives because state might be spending funds with illegal conditions attached); *State of California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (state may challenge environmental impact statement if it is geographically proximate to the site and statute requires state consultation as a prerequisite); *Department of Energy v. Louisiana*, 690 F.2d 180, 187 (5th Cir. 1982), *cert. denied*, 460 U.S. 1869 (1983) (state may challenge Department of Energy regulations which affect its finances adversely as a landowner and sovereign).

From these cases, we conclude that the State's alleged injury is insufficiently proximate to the actions at issue and the remedy to be offered by this action an insufficient guarantee of solvency to warrant state standing in this

case. In the words of the *Kleppe* Court, "the unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing." *Kleppe*, 533 F.2d at 672.

Having found that the State cannot establish a sufficient injury in fact to satisfy the constitutional requirements of standing, we need not consider the prudential standing requirements. We do, however, consider the State's standing as *parens patriae*.

B. Standing to Sue *Parens Patriae* on Behalf of the Citizens of Iowa.

The State also maintains that it has standing to sue on behalf of its citizens who might otherwise be unable to seek legal redress for themselves. Although some state *parens patriae* suits against the federal government have occasionally been allowed in the past,[7] the most recent and well-reasoned discussions of this type of suit disallow its use against the federal government and reserve *parens patriae* instead for the state to vindicate the rights of its citizens against private defendants.

In the Supreme Court's most recent consideration of the issue, it elaborated the requirements for *parens patriae* standing in general terms. *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982). In a footnote, however, it qualified that discussion and disallowed state suits against the federal government on a *parens patriae* theory:

> A State does not have standing as *parens patriae* to bring an action against the Federal Government. Massachusetts v. Mellon, 262 US 447, 485-486, 67

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[7] *New York v. United States*, 331 U.S. 284 (1947) (approving state standing without discussion *parens patriae); Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (same); *Washington Utilities and*

> L.Ed. 1078, 43 S. Ct. 597 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241 [45 L.Ed. 497, 21 S.Ct. 331]), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*"). Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants.

Id. at 610, n. 16.

The D.C. Circuit had previously developed the rationale against state *parens patriae* suits against the federal government. That Court attributed the judicial unwillingness to liberalize *parens patriae* requirements to the general supervisory aspect of federal law and to the basic interests of federalism, "which reduce[] most basically to the avoidance of state interference with the exercise of federal process." *Commonwealth of Pennsylvania v. Kleppe,* 533 F.2d 668, 677-78 (D.C. Cir.), *cert. denied*. 429 U.S. 977 (1976).

Although we recognize the considerable importance that the State of Iowa and its citizens place on the continued vitality of agriculture in the state's economy, we cannot allow the State to proceed as *parens patriae* in this case. To do so would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system.

IV. CONCLUSION.

Although we conclude that the State is without standing to pursue this action, the remaining appellants may do so on remand. On remand, the district court should promptly

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Transportation Commission v. F.C.C., 513 F.2d 1142, 1145-46 (9th Cir.), *cert. denied*, 422 U.S. 836 (1975) (same); *State of Florida v. Weinberger*, 492 F.2d 488, 493-94 (5th Cir. 1974) (same).

hold a hearing to consider appellants' requests for preliminary and permanent injunctive relief compelling the Secretary to implement the SDPP. The district court should note especially the imperative language in the statute ("shall" make disaster payments) and the close similarity that the plight of Iowa's farmers bears to the disasters contemplated by the statute and its legislative history. We express no opinion as to whether the Secretary ought to develop the statute's substantive standards under formal rulemaking procedures or individual adjudications. As we noted in *Allison*, formal rulemaking "would better insure a uniform set of substantive standards," but case-by-case adjudication may allow the consistent precedential use of previous decisions. *Allison*, 723 F.2d at 637-39. Whatever method is chosen, we emphasize that, if the programs are to be implemented, they must be implemented quickly so that eligible farmers may receive assistance at the earliest possible date.

FAGG, Circuit Judge, dissenting.

Plaintiffs challenge the Secretary's refusal to implement the portion of the Special Disaster Payments Program (SDPP) authorizing but not requiring the Secretary to make emergency disaster payments available to farmers if each of three prerequisite conditions is first found to exist in a given situation. 7 U.S.C. § 1444d(2)(D). Plaintiffs contend that in this case each of the necessary conditions is present and further that the Secretary's failure to act is arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A). The government, however, argues that the "abuse of discretion" standard of review has no application in this case because the Secretary's refusal to implement this program is committed to his discretion by law and is not subject to judicial review. *Id.* § 701(a)(2).

The court today rejects the government's position and concludes the "[SDPP] presents a straightforward case which compels judicial review of agency inaction." *Ante* at 8. Having so concluded, the court requires the Secretary to adopt "procedural and substantive standards under which disaster assistance can be disbursed," *id.* at 9, and by implication requires the Secretary to implement the payments program and make emergency disaster payments available. I believe the court's decision is contrary to the controlling legal standard and impermissibly diminishes the discretion granted the Secretary by law.

As a general rule, the Administrative Procedures Act provides individuals with the right to seek judicial review of adverse agency action. 5 U.S.C. § 702. This general rule in not without exception, however. One narrow exception is contained in 5 U.S.C. § 701(a)(2) which exempts from judical review those decisions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The Supreme Court first examined the scope of this exception in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), in which the Court concluded the exception "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply.*' " *Id.* at 410 (emphasis added) (citation omitted). Recently, in *Heckler v. Chaney,* 105 S. Ct. 1649 (1985), the Court clarified the test to be applied in determining when agency action is committed by law to agency discretion or, in other words, when there is no law to apply. The Court stated:

> [The narrow exception of § 701 (a)(2) is applicable and] review is not to be had if the statute is drawn so that a court would have no *meaningful standard* against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgement *absolutely.* This construction avoids

> conflict with the "abuse of discretion" standard of review in § 706—if no *judicially manageable* standards are available for judging how and when an agency *should* exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."

Id. at 1655 (emphasis added). Applying this standard to the present action, I conclude that no judicially manageable standards exist against which to judge the Secretary's action and thus the Secretary's action is "committed to agency discretion by law." 5 U.S.C. § 701 (a)(2).

In establishing the SDPP, Congress' primary goal was to "provide for a limited continuation of disaster payments to cover those parts of the country into which Federal crop insurance has yet to expand." S. Rep. No. 126, 97th Cong. 1st Sess. 76, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1965, 2041. To accomplish this goal, Congress provided that when natural disaster prevents the planting or harvesting of feed grains but Federal crop insurance is not yet available, the Secretary "*shall*" make disater payments to eligible farmers. 7 U.S.C. § 1444d (2) (A)-(C) (emphasis added). These provisions of the SDPP require the Secretary to administer a reasonably well-defined relief program, implemented and placed in effect by Congress. In essence, little is left to the Secretary's discretion.

The remaining provision of the SDPP, *id.* § 1444d (2) (D), stands in sharp contrast to the subsections just discussed. This provision authorizes the Secretary to implement a disaster payments program in situations when crop insurance *is* available. However, unlike those portions of the SDPP that compel the Secretary to make payments when no insurance is available, this provision simply authorizes the Secretary to implement a payments program and provides that "the Secretary *may* make disaster payments * * * whenever [he] determines that—

(i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other non-conserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;

(ii) Federal crop insurance indemnity payments and other forms of assistance made available by the Federal Government to such producers for such losses are insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the Federal crop insurance program; and

(iii) additional assistance must be made available to such producers to alleviate the economic emergency.

Id. (emphasis added).

The court relies on these factors, which by implication incorporate the factors mentioned in the legislative history of the SDPP, *see* S. Rep. No. 126, 97th Cong. 1st Sess. 78, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1965, 2043 (comments of Senator Heflin), to find that judicially manageable standards exist against which the Secretary's decision can be judged. In so doing, I believe the court not only fundamentally misunderstands the limiting effect these criteria have on the Secretary, but also misapplies the controlling legal standard recently articulated by the Supreme Court in *Chaney,* 105 S. Ct. at 1655.

Rather than providing any meaningful standards against which the reasonableness of the Secretary's decision can be judged, these criteria only establish the threshold at which the Secretary has discretion to act and can implement a disaster payments program if he chooses to do so. Absent any one of these factors, the Secretary is without discretion; he can take no action. However, once

these criteria are established, and in this case they apparently are, the Secretary is authorized to act. But, unlike the prior provisions, 7 U.S.C. § 1444d (2) (A)-(C), in this instance Congress has seen fit only to provide that the Secretary "*may*" take action if he chooses to do so. *See id.* § 1444d (2) (D). Thus, the Secretary's decision to act or not act is committed to his discretion.

Under *Chaney,* the issue then becomes whether standards exist under which this court can determine whether the Secretary's refusal to act constitutes an abuse of this discretion. *See* 5 U.S.C. § 706 (2)(A). Such a determination requires this court to find judicially manageable, congressionally implicated standards that indicate those situations in which Congress intended that the Secretary *should* (rather than could) exercise his discretion. *Chaney,* 105 S. Ct. at 1655. With respect to this issue, the SDPP and its legislative history provide no guidance. Here, the court effectively views the presence of the criteria under which the Secretary *may* take some action as also establishing that the Secretary *must* take some action. Such a conclusion ignores the plain language of the SDPP.

The court's reliance on the General Accounting Office report is also misplaced. As an initial matter, a report such as this has no binding effect on the Secretary and does not provide this court with law to apply in reviewing the propriety of the Secretary's action. Further, this memo specifically assumes that the Secretary has decided to implement the program in a particular situation and only suggests that the Secretary adopt uniform criteria in determining what specific areas will be eligible to receive payments. Here, the Secretary has determined that the program as a whole will not be implemented. Such a decision is, in my opinion, within the Secretary's discretion, and as such the General Accounting Office report is irrelevant and of no significance in judging the appropriateness of this decision.

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As an additional matter, I believe the prior Eighth Circuit decision in *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983), is inapplicable in this case. In *Allison,* Congress gave the Secretary no discretion with respect to developing a loan deferral program. *Id.* at 635. Rather, the only decision left to the Secretary was in determining whether individual loans would or would not be deferred. *Id.* In the present action, Congress has committed to the Secretary not only the decision of whether to make certain disaster payments to individuals in specific cases, but has also committed to the Secretary the decision of whether to implement the program under any circumstances. Had the Secretary determined that the program should be implemented and then refused to promulgate procedures governing general entitlement to the payments being provided, a different question would be presented, and under those circumstances, *Allison* would be applicable.

I conclude that Congress has placed the determination of whether to implement the discretionary program encompassed in the SDPP entirely with the Secretary. While criteria exist which unless established prevent the Secretary from exercising any discretion, once these criteria have been established, there are no guidelines against which the Secretary's decision to act or not act can be judged. Because no judicially manageable standards exist, no law exists which can be applied to this case and judicial review is not appropriate.

As a final comment, I disagree with the court's cursory discussion of the anti-injunction provision found in 15 U.S.C. § 714b (c), which provides "no * * * injunction * * *, mesne or final, shall be issued against the [Commodity Credit] Corporation [(CCC)] or its property." 15 U.S.C. § 714b (c). In this action, plaintiffs seek a "preliminary injunction to compel * * * [the] Secretary * * * to implement three federal agricultural disaster relief programs." *Ante* at 1. Because the SDPP is administered

by the Secretary through the CCC, 7 U.S.C. § 1444d (h), this court is without authority to grant plaintiffs the relief they request, and the action should be dismissed.

Further, although implying that its decision is not injunctive in nature, the court effectively enjoins the Secretary (and thus the CCC) and compels him to make available a program the implementation of which has been left entirely within his discretion. This result is contrary not only to the intent of Congress in adopting the SDPP, but is also contrary to the Administrative Procedures Act, recent Supreme Court authority, and the provisions of the Commodity Credit Corporation Act.

For the above stated reasons, I would affirm the decision of the District court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 84-356-A

THE STATE OF IOWA, EX REL.,
THOMAS J. MILLER ATTORNEY GENERAL OF IOWA,
PLAINTIFF

v.

JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES DEPARTMENT OF
AGRICULTURE; ET AL.,
DEFENDANTS

Aug. 22, 1984

RULING AND ORDER
ON
MOTION TO DISMISS

Plaintiff's motion for preliminary injunction and defendants' motion to dismiss came on for hearing August 10, 1984. Appearances are noted in the Clerk's minutes for that date. Although defendants requested a ruling on their motion to dismiss before hearing on the motion for preliminary injunction, the Court determined that it was in the interest of justice and judicial efficiency to submit the motions together. Evidence on the motion for preliminary injunction was received on August 10, 1984, and statements of counsel on both motions were heard on August 13, 1984.

After having heard the statements of counsel and the testimony, reading the affidavits, and reviewing the written briefs and the remainder of the file, the Court concludes that the defendants' motion to dismiss must be sustained.

This action was initially brought by the State of Iowa under the Federal Administrative Procedure Act's judicial review provisions, 5 U.S.C. sections 701-706 [hereinafter "APA"], in an effort to compel John R. Block, Secretary of the United States Department of Agriculture, to implement five federal agricultural disaster relief programs[1] in Iowa. Several Iowa farmers intervened as plaintiffs in the action after defendants filed their motion to dismiss. Plaintiffs contend that defendants' failure to implement the five programs wrongfully contravened the intent of Congress stated in the statutory provisions providing for the programs. According to plaintiffs, Mr. Block's failure to implement the five programs to relieve the drought-stricken conditions of farmers in several Iowa counties, was arbitrary, capricious, an abuse of discretion, and a violation of the separation of powers doctrine. Plaintiffs ask the Court to hold Mr. Block's failure to act unlawful under 5 U.S.C. section 706, and to issue a preliminary and permanent injunction compelling defendants to exercise their discretion to implement the five programs.

Defendants moved to dismiss the State of Iowa for lack of standing, and to dismiss the entire action for lack of subject matter jurisdiction. The Court will consider each of defendants' contentions separately.

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[1] The five programs are (1) the Emergency Feed Program, 7 U.S.C. Section 2267; (2) the Livestock Feed Program, 7 U.S.C. Section 1427; (3) the Disaster Reserve Program, 7 U.S.C. Section 1427a; (4) a prevented-planting and reduced-yield program, 7 U.S.C. Section 1444d; and (5) a program for the orderly disposal of stockpiled grain, 7 U.S.C. Section 1851.

I. *State of Iowa's Standing.*

The State of Iowa has brought this action as *parens patriae* on behalf of its citizens and on its own behalf because the economic well-being of the State will be injured if substantial numbers of Iowa farmers are forced out of business due to defendants' failure to implement the five agricultural disaster relief programs.

A. *Parens Patriae* Standing

In Massachusetts v. Mellon, 262 U.S. 447 (1923), the State of Massachusetts sought to represent its citizens against the United States Secretary of the Treasury in a challenge to the constitutionality of a certain federal statute. The Court held:

> It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect to their relations with the Federal Government. In that field it is the United States, and not the State which represents them as *parens patriae*. . . .

Massachusetts v. Mellon, 262 U.S. at 485-86. Several courts read *Mellon* as prohibiting states from suing as *parens patriae* the federal government. E.g., Pennsylvania v. Porter, 659 F. 2d 306, 317 (3d Cir. 1981) (interpreting prior caselaw), *cert. denied,* 458 U.S. 1121, (1982); Graham v. Schweiker, 545 F. Supp, 625, 627 (S.D. Fla. 1982). In Pennsylvania v. Kleppe, 533 F. 2d 668 (D.C. Cir.), *cert. denied,* 429 U.S. 977 (1976), the Court of Appeals for the District of Columbia Circuit addressed the issue before this Court. The *Kleppe* Court held that, absent a showing that a state's action as *parens patriae* would not substantially intrude into the discretionary adminis-

trative workings of the federal agency, the federal government is the only proper party to act as *parens patriae* for citizens seekings benefits flowing directly from the federal government. *Id.* at 679-80. The State does not contend that this action would not constitute a substantial intrusion into the discretionary administration of the United States Department of Agriculture. Thus, under the pre-July 1982 precedent, the State of Iowa would not have standing to sue as *parens patriae.*

In July 1982, the United States Supreme Court handed down Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), holding that Puerto Rico could represent its citizens as *parens patriae* in an action against private persons for violating a federal statute. The Court carefully pointed out, however, that the action could not have been maintained against the federal government. Four members of the Court stated a proposition that the concurring justices did not dispute: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n. 16.

Thus, it appears that the Supreme Court has recognized the continuing viability of the holding in *Mellon.* Applying that rule, the Court concludes that the State does not have standing to bring this action as *parens patriae.*

B. Proprietary Interest Standing.

The State of Iowa alleges that defendants' failure to implement the agricultural disaster relief programs will harm the State by causing increased unemployment, decreased tax revenues, injury to the State's interest in insuring equal treatment in the federal system, injury caused by increased fiscal outlays resulting from social dislocation, and general injury to the economic well-being of Iowa citizens. The State admits that neither it nor any of its agencies would receive any relief under any of the five programs, and that it takes no part in administering any of the programs.

1. Are the State's alleged interests "proprietary?"

In Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 591 (1982), the United States Supreme Court distinguished between proprietary interests—which can serve as the basis of the State's action—and quasi-sovereign interests, which can form the basis only for an action as *parens patriae.* The Court stated that a proprietary interest is one a state acquires by owning property or participating in a business-type venture, *id.* at 601-02, while a quasi-sovereign interest is typified by a state's concern for the health and well-being of the state's residents in general or a desire not to be discriminatorily denied its rightfuil status within the federal system. *Id.* at 607-08. It is apparent that the State's alleged injuries of increased unemployment, disparate treatment, and general injury to the economic well-being of the state are quasi-sovereign in character. Thus, such injuries, although appropriate for forming the basis of standing as *parens patriae,* are not sufficient to form the basis of standing on proprietary interests.[2] Pennsylvania v. Kleppe, 533 F. 2d 668, 671 (D.C. Cir.), *cert. denied,* 429 U.S. 977 (1976).

2. Has that State shown that it has suffered injury in fact and that the State's injuries are not merely generalized grievances?

In order to state a cognizable Article III case and controversy, the State must show that its own alleged injuries are actual or imminent, that the injuries can be fairly traced to the challenged inaction of the Secretary, and that the injury can be redressed by specific judicial relief. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472-74 (1982); Cason v. Pierce, 719 F. 2d 931, 933 (8th Cir. 1983). In addition, in order to show that it is a proper party-plaintiff, the State must show that its injuries are to

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[2] This holding is closely tied to the Court's determination of the State's failure to show sufficient injury in fact on these grounds, *infra.*

itself, and not generalized grievances shared in substantially equal measure by the citizens of Iowa. Warth v. Seldin, 422 U.S. 490, 499-500 (1975). Several of the State's alleged injuries, while sufficient to support standing as *parens patriae* against a private defendant, fail to constitute distinct, palpable injuries to the State as a state. The State's alleged injuries of increased unemployment, increased social outlays due to social dislocation, and general injury to economic well-being are so speculative and causally removed from the alleged wrong, that they do not constitute injury in fact. The alleged injuries to the State in the forms of increased unemployment, decreased tax revenues, and disparate treatment are generalized grievances, shared by each citizen of Iowa. *See* Pennsylvania v. Kleppe, 533 F. 2d 668, 672 (D.C. Cir.), *cert. denied,* 429 U.S. 977, (1976). In summary, the Court concludes that the State has failed to allege an injury to itself that would constitute a sound basis for standing in federal court.

3. Is the State arguably within the zone of interests protected by the agricultural disaster relief programs?

In order to maintain standing to sue, the State must also show that its alleged interests in this suit are arguably within the zone of interests protected by any one of the five agricultural disaster relief programs. Association of Data Processing Servs. v. Camp, 397 U.S. 150, 154-56 (1970); Taylor v. Jones, 653 F. 2d 1193, 1207-08 (8th Cir. 1981). The language of the statutes establishing the programs indicate that Congress intended to relieve farmers stricken by agricultural disasters. The State of Iowa is not an intended beneficiary of any of the programs and has no part in administering them. Under these circumstances, the Court concludes that the State also lacks standing because it is not even arguably within the zone of interests created by the programs. Pennsylvania v. Kleppe, 533 F. 2d 668, 671-72 (D.C. Cir.), *cert. denied,* 429 U.S. 977 (1976); *see* Granville House, Inc. v. Department of Health

& Human Servs., 715 F. 2d 1292, 1299 (8th Cir. 1983); Kozera v. Spirito, 723 F. 2d 1003, 1007 (1st Cir. 1983); Comment, State Standing to Challenge Federal Administrative Action: A Re-examination of the *Parens Patriae* Doctrine, 125 U. Pa. L. Rev. 1069, 1095-98 (1977).

In summary, the Court concludes for the reasons stated above that the State lacks standing to bring this action on the basis of its asserted proprietary interests.

II. *Subject Matter Jurisdiction.*

The parties agree that the implementation of the agricultural disaster relief programs is committed to the discretion of the Secretary of the United States Department of Agriculture. Plaintiffs contend that the Secretary abused that discretion by failing to implement the programs in several Iowa counties after the drought of 1983 ravaged southeast Iowa, and that his exercise of discretion is reviewable under the APA, 5 U.S.C. section 706(2)(a).[3] Defendant contends that the discretion to implement the programs is vested solely in the Secretary, and that such discretion is not subject to judicial review, pursuant to the APA, 5 U.S.C. Section 701(a)(2).[4]

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[3] Section 706(2)(a) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . .

[4] Section 701(a)(2) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

. . .

(2) agency action is committed to agency discretion by law.

Section 706 of the APA provides the standards for reviewing agency action after it has been determined that judicial review exists. Reviewability is determined by section 701. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971).

The exception to judicial review established by Section 701(2)(a) "is a very narrow exception . . . . The administrative history of the Administrative Procedure Act indicates that is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). There is a presumption that agency action is reviewable, which is rebutted only when the review court has no law to apply. Tuepker v. Farmers Home Adminstration, 708 F. 2d 1329, 1331-32 (8th Cir. 1983).

In determining whether there is law to apply, federal courts have analyzed pragmatic considerations as to whether an agency determination is the proper subject of judicial review. These pragmatic considerations include whether the challenged agency action is of a type Congress intended to be left to a reasonable exercise of agency expertise, and whether the problem that formed the basis of the challenged agency action is one suitable for judicial determination. *Id.* at 1332; Chaney v. Heckler, 718 F. 2d 1197, 1195 (D.C. Cir. 1983); *see* Cooperative Power Association v. Federal Energy Regulatory Commission, 733 F. 2d 577, 581 (8th Cir. 1984) (per curiam); United States v. 1426.5 Acres of Land, 732 F. 2d 1375, 1379-81 (8th Cir. 1984) United States v. Wiley's Cove Ranch, 295 F. 2d 436, 440-43 (8th Cir. 1961).

The language used by Congress in the statutes establishing the five agricultural disaster relief programs indicates that Congress intended to make a broad delegation of power to the Secretary. None of the language mandates that the Secretary implement the programs under certain conditions. Instead, Congress used permissive language, allowing the Secretary to set the terms of implementation he determined to be in the national interest.

This broad delegation of authority by Congress leaves the Court with little, if any, standard for reviewing the Secretary's failure to implement the programs.[5]

Pragmatic considerations also incline the Court to find that the Secretary's failure to implement the five programs in southeast Iowa is not a proper subject for judicial review. Throughout the years Congress has authorized a broad range of discretionary assistance programs to deal with agricultural disasters. Recognizing that the Secretary possesses expertise in agricultural affairs and the means of evaluating the everchanging national agricultural conditions, Congress often vested discretion in the Secretary to determine whether to implement such programs. In deciding which programs to implement and the areas or individuals that are entitle to assistance, the Secretary must consider the level of relief required, the national and international ramifications of implementation, the level of relief afforded by programs already implemented, and various other economic and managerial issues. For the Court to fairly and fully review the discretionary decision of the Secretary, all of the factors that entered into the decision would have to be brought before the Court, if that would be possible. In addition, the Court does not believe that it could properly review the Secretary's determinations—which were certainly based on data gathered from national and international sources—and then limits [*sic*] its decision whether the Secretary acted arbitrarily to the situation presented in several southeast Iowa counties.

---

[5] The Court recognizes that the Secretary's regulation, 7 C.F.R. Section 1475.53, presents the judicial review issue in a distinct procedural context. However, the Court accepts the defendants' statement that the Livestock Feed Program, 7 U.S.C. Section 2267, could be re-implemented by the Secretary at any time by merely rescinding Section 1475.53.

Were it to review the Secretary's decision, the Court would have no difficulty in finding that the emergency assistance programs actually implemented by the Secretary did not provide sufficient relief to the livestock farmers in southeast Iowa who find themselves in precarious financial situations due, at least in part, to the adverse weather conditions of the past three years. But it is not for the Court to substitute its judgment for that of the Secretary under the circumstances presented here.

As indicated above, the Secretary must look far beyond the particular local situation in exercising his discretion. The national and international concerns, the empirical data, the remifications of particular actions including the effect of the national budget and other factors that may be involved in a particular decision are so far-reaching and complex that this discretionary determination is not a proper subject of judicial review. Accordingly, the Court shall grant the motion to dismiss for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that defendant's motion to dismiss plaintiff State of Iowa for lack of standing shall be and hereby is granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss this action for lack of subject matter jurisdiction shall be and hereby is granted.

Signed this 22 day of August, 1984.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2278SI

THE STATE OF IOWA, EX REL, ETC.,
APPELLANT

v.

JOHN R. BLOCK, ETC., ET AL.,
APPELLEES

Appeal from the United States District Court
for the Southern District of Iowa

This appeal was submitted on the record of the District Court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

August 15, 1985

A True Copy.
ATTEST: Clerk, U.S. Court of Appeals, Eight Circuit
12/18/85

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2278SI

THE STATE OF IOWA, EX REL, ETC.,
APPELLANT

v.

JOHN R. BLOCK, ETC., ET AL.,
APPELLEES

Appeal from the United States District Court
for the Southern District of Iowa

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges McMillian, Fagg, Bowman and Wollman would have granted the petition.

Petition for rehearing by the panel is also denied.

Judge Donald R. Ross did not participate.

December 5, 1985

APPENDIX E

The Special Disaster Payment Program (SDPP) which is contained in the Agriculture and Food Act of 1981, 7 U.S.C. 1444d(b)(2), provides:

> (A) Except as provided in subparagraph (C) of this paragraph, if the Secretary determines that the producers on a farm are prevented from planting any portion of the acreage intended for feed grains to feed grains or other nonconserving crops because of drought, flood, or other natural disaster, or other condition beyond the control of the producers, the Secretary shall make a prevented planting disaster payment to the producers on the number of acres so affected but not to exceed the acreage planted to feed grains for harvest (including any acreage which the producers were prevented from planting to feed grains or other nonconserving crop in lieu of feed grains because of drought, flood, or other natural disaster, or other condition beyond the control of the producers) in the immediately preceding year, multiplied by 75 per centum of the farm program payment yield established by the Secretary times a payment rate equal to 33⅓ per centum of the established price for the crop.
>
> (B) Except as provided in subparagraph (C) of this paragraph, if the Secretary determines that because of drought, flood, or other natural disaster, or other condition beyond the control of the producers, the total quantity of feed grains which the producers are able to harvest on any farm is less than the result of multiplying 60 per centum of the farm program payment yield established by the Secretary for such crop by the acreage planted for harvest for such crop, the Secretary shall make a reduced yield disaster payment to the producers at a rate equal to 50 per centum of the established price for the crop for the deficiency in production below 60 per centum for the crop.

(C) Producers on a farm shall not be eligible for disaster payments under this paragraph if crop insurance is available to them under the Federal Crop Insurance Act [7 U.S.C. 1501 *et seq.*] with respect to their feed grain acreage.

(D) Notwithstanding the provisions of subparagraph (C) of this paragraph, the Secretary may make disaster payments to producers on a farm under this paragraph whenever the Secretary determines that—

(i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other nonconserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;

(ii) Federal crop insurance indemnity payments and other forms of assistance made available by the Federal Government to such producers for such losses are insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the Federal crop insurance program; and

(iii) additional assistance must be made available to such producers to alleviate the economic emergency.

The Secretary may make such adjustments in the amount of payments made available under this subparagraph with respect to individual farms so as to assure the equitable allotment of such payments among producers taking into account other forms of Federal disaster assistance provided to the producers for the crop involved.

The Commodity Credit Corporation Charter Act, 15 U.S.C. 714b, provides in pertinent part:

> The Corporation—
>
> * * * * *
>
> (c) May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. * * *

The Administrative Procedure Act, 5 U.S.C. (& Supp.II) 701 *et seq.* provides that a person aggrieved by agency action may seek judicial review (5 U.S.C. (Supp.II) 702), but such review shall not be available "to the extent that"—

(a)(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

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No. 85-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD E. LYNG, Secretary of the United States Department of Agriculture, and THE UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

vs.

THE STATE OF IOWA *ex rel.* THOMAS J. MILLER, Attorney General of Iowa,

and

DANNY GETTLER, *et al.*,

Respondents.

JOINT OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's administrative action to abolish, with respect to farmers devastated by a severe drought in 1983, a statutorily created Congressional disaster program is immunized from judicial review as a matter of law by the "committed to agency discretion" exception of the Administrative Procedure Act.

2. Whether an Administrative Procedure Act action seeking to require the Secretary to comply with federal law is an effort to obtain an injunction against the property of the Commodity Credit Corporation, a non party to the action.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

NO. 85-1818

RICHARD E. LYNG,
SECRETARY OF AGRICULTURE,
AND THE DEPARTMENT OF
AGRICULTURE,

Petitioners,

vs.

STATE OF IOWA EX REL.
THOMAS J. MILLER,
ATTORNEY GENERAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

The respondents, State of Iowa and several individual farmers, hereby offer the following brief in opposition to the Secretary's petition for writ of

certiorari in the above-captioned matter.

STATEMENT OF THE CASE

In the summer of 1983, a devastating drought hit farmers in the Midwest. For livestock farmers in southern Iowa, it was the worst drought in memory. In the words of Secretary Block, "My evaluation is that it probably is the most severe drought we've had in the last 50 years. The drought of the 1930s may well have been worse, but I'm not convinced necessarily that is the case." See Problems Caused by the Drought Situation; Hearing Before the Committee on Agriculture, House of Representatives, 98th Cong., 1st Sess. (1983) (statement of Secretary John Block) at 3.

Notwithstanding the severity of the drought, the Secretary refused to

provide disaster assistance to livestock producers under three Congressionally established programs. The Livestock Feed Program, or LFP, authorizes the Secretary to make available to drought stricken farmers federally held commodities at advantageous prices. 7 U.S.C. § 1427. The Emergency Feed Program, or EFP, authorizes the Secretary to provide cash assistance to livestock producers in order to preserve herds when natural disasters such as drought have created an emergency for farmers. 7 U.S.C. § 2267. The Special Disaster Payments Program or SDPP, authorizes the Secretary to make cash payments to farmers whose yields on feed grain are devastated by natural disaster. 7 U.S.C. § 1444d(b)(2)(D).

The Secretary has structured the Livestock Feed Program and the Emergency Feed Program through rules published pursuant to the Administrative Procedure Act, 7 U.S.C. § 701 et seq. See 7 C.F.R. § 1475.1-.17 (LFP); 7 C.F.R. § 1475.50-.68 (EFP). Until recently, the Secretary did not promulgate rules regarding the Special Disaster Payments Program.

Notwithstanding requests from the Governor of Iowa and the Iowa Congressional delegation, the Secretary refused to provide any disaster relief under the three programs to Iowa livestock producers who were devastated by the horrible drought. With respect to the Livestock Feed Program, the Secretary simply walked away from his own published rules by refusing to honor them. With respect

to the Emergency Feed Program, the Secretary relied on a rule which purported to terminate benefits under the program after April 8, 1982. 7 C.F.R. § 1475.53. The Secretary further refused to make Special Disaster Payments available to victims of the drought, even though similar payments were made available to farmers in Texas, New Mexico, and Oklahoma who, in 1982, experienced a far, far less serious natural disaster by any objective measure. See U.S.D.A. Needs Objective Criteria for Awarding Special Disaster Payments, Report to the Honorable Berkley Bedell (General Accounting Office) (November 2, 1982) (USDA awards Special Disaster Payments in inconsistent manner) at 4.

After informal efforts to persuade the Secretary to provide assistance under the disaster programs failed, the State of Iowa filed an action under the Administrative Procedure Act challenging the Secretary's refusal to provide disaster assistance to Iowa farmers. Several individual farm families intervened in the action. With respect to the LFP, the plaintiffs claimed that the Secretary was legally required to provide benefits under the rules which he himself promulgated. With respect to the EFP, the plaintiffs attacked the rule which purported to terminate benefits after April 8, 1982, as arbitrary, capricious, and contrary to law. The plaintiffs finally attacked the failure to implement the SDP program as

arbitrary, capricious, and an abuse of discretion under the APA.

The District Court dismissed the action on the ground that there was "no law to apply" in reviewing the Secretary's action. See State of Iowa ex rel. Miller et al. v. Block, Civ. No. 84-356A (August 22, 1984). Pet. App. at 31a-32a. The District Court also held that the State of Iowa lacked standing as parens patriae to litigate the lawsuit. Pet. App. at 26a-30a.

The District Court, however, recognized the harsh impact of the drought on Iowa livestock producers and the inadequacy of the Secretary's response to the emergency. According to the District Court, the Court

> . . . would have no difficulty in finding that the emergency programs actually implemented by the Secretary did not

> provide sufficient relief to the livestock farmers in southeast Iowa who find themselves in precarious financial situations due, at least in part, to the adverse weather conditions of the past three years.

Pet. App. at 33a.

On appeal, the Eighth Circuit held that the anti-injunction provision of 15 U.S.C. § 714b(c), which prevents the imposition of injunctions against the Commodity Credit Corporation, barred the plaintiffs from utilizing the APA to attack the failure of the Secretary to follow his own LFP rules and to attack attacking the purported "termination" rule of the EFP. The Court held, however, that the attack of the plaintiffs regarding the SDP was not barred by the anti-injunction provision, found "ample" law to apply, and reversed the holding of the district court with

respect to the SDP. On remand, the District Court was instructed to note "the close similarity that the plight of Iowa's farmers bears to the disasters contemplated by the statute and its legislative history." State of Iowa ex rel. Miller v. Block, 771 F.2d 347, 355 (8th Cir. 1985). Pet. App. 17a. On the issue of the standing of the State to litigate the action, the Court of Appeals affirmed the District Court. Id. at 352-55, Pet. App. 10a-16a.

On remand from the Court of Appeals, the Secretary filed a motion for remand of the case to the agency for "prompt" rulemaking. See Declaration of Milton J. Hertz, (Exhibit G, Joint Resistance to Application for Stay, A-No. 85-1818) at 3, ¶ 7. On January 27, 1986, the District Court entered an order

remanding the case to the agency for final rulemaking by June 1, 1986.

After the District Court entered its remand order, the State of Iowa and the individual farmer-plaintiffs filed a timely petition for writ of certiorari with this Court seeking review of the decision of the Court of Appeals. State of Iowa et al. v. Lyng, No. 85-1481. In the petition, the State and farmers claim that the Court of Appeals clearly erred when it considered the plaintiffs' action against the Secretary as an action against the CCC. The State and individual farmers argue that the case presents a vintage APA attack on the Secretary for failing to follow his own rules with respect to the LFP. The State and farmer-plaintiffs further claim that their challenge to the

purported termination rule as arbitrary, capricious, and an abuse of discretion is a conventional APA proceeding against the Secretary, not the CCC.

The Secretary also filed a petition for certiorari challenging the Court of Appeals' opinion with respect to the SDP program. The Secretary seeks to confine this Court's review to whether the Secretary has total discretion to implement to SDP no matter how serious the drought or how great the financial hardship on individual farmers and whether the anti-injunction act applies to his decision to refuse to allow SDP payments to Iowa farmers. The Secretary resists consideration of whether the anti-injunction act applies to the plaintiffs' challenges of the Secretary's refusal to follow his own LFP

rules and the plaintiffs' challenge to the Secretary's "termination" of EFP benefits.

With the filing of the petitions for certiorari, the Secretary sought to forestall the rulemaking process that he himself had requested. Notwithstanding his failure to seek a stay from the Court of Appeals as required by Fed. R. App. P. 41(a), the Secretary belatedly sought a stay of what he earlier pledged would be "prompt" rulemaking. The District Court and the Court of Appeals summarily dismissed the request. On May 8, Justice Harry Blackmun entered a temporary stay to protect this Court's jurisdiction pending a response from the plaintiffs. On May 16, Justice Blackmun vacated the temporary stay and denied the motion for stay in all respects.

On May 20, 1986, the Secretary published in the Federal Register a Proposed Rule for the SDPP. See 51 Fed. Reg. 18552 (May 20, 1986). The Proposed Rule establishes a series of sky-high eligibility requirements that must be satisfied before a farmer may obtain benefits.

On June 2, the State of Iowa and the individual farmers filed a lengthy Comment with the Secretary attacking the Proposed Rule, which stated that if the Rule were adopted, it would virtually abolish the program by administrative action. See Comment of State of Iowa, et al., In Re Special Disaster Payment Program Rulemaking, (June 2, 1986) at 46. The plaintiffs were joined in the Comment by the states of Minnesota,

Wisconsin, Illinois, Missouri, Kansas, Nebraska, and North Dakota.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The holding of the Court of Appeals that there is ample law to apply so that judicial review is available to determine whether the Secretary erred in failing to implement the Special Disaster Payments Program is clearly correct.

a. Contrary to the Secretary's argument, he does not have "sole discretion," Petition at 14, to determine when or if to grant benefits under the SDPP. Such an approach would allow the SDPP program to be used as a political slush fund for the disbursement of benefits for partisan political purposes. Instead, Congress created a

program that would insure that farmers received adequate disaster assistance while the Secretary engaged in the painstaking effort of creating a comprehensive program of federal crop insurance to replace disaster aid programs. During the transition period, Congress expected the Secretary to provide disaster payments when he found:

> (i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other nonconserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;
>
> (ii) federal crop insurance indemnity payments and other forms of assistance made available by the federal government to such producers for such losses are insufficient to alleviate such

> economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the federal crop insurance program; and
>
> (iii) additional assistance must be made available to such producers to alleviate the economic emergency.

7 U.S.C. § 1444d(b)(2)(D).

b. The legislative history provides additional law to apply. Senator Heflin was co-author of the Amendment to the Agriculture and Food Act of 1981, now codified at 7 U.S.C. § 1444d(b)(2)(D) which authorized SDP payments notwithstanding the existence of crop insurance. Senator Heflin provided a Congressional committee with what the committee, using language ironically similar to that employed by courts reviewing agency action under the APA, characterized as "some idea of

situations in which the Secretary reasonably could be expected to implement the disaster payments programs." The situations included instances where:

> (1) federal crop insurance excludes coverage for the disaster risk which caused the loss;
>
> (2) there is a lack of understanding of the crop insurance program among producers affected by the disaster;
>
> (3) crop insurance was not adequately sold in the area affected by the disaster, or educational efforts were inadequate;
>
> (4) FCIC used an inaccurate actuarial basis so that a producer affected by disaster was unable to obtain adequate crop insurance coverage.

S. Rep. No. 126, 97th Cong., 1st Sess. (1981), 77-78. This legislative history provides the Court with unusually clear guidance in determining whether the Secretary's failure to implement the

Special Disaster Payments Program was contrary to the will of Congress.

c. The administrative materials related to the SDPP demonstrate beyond question that there is "law to apply" in reviewing the Secretary's actions under the program. In 1982 the Secretary implemented the disaster payments program in Texas but not in Iowa, a discrepancy which led to a United States General Accounting Office (GAO) study of the administration of the SDPP. The GAO had no difficulty finding "law to apply" from the clear Congressional intent of the program. After determining that the purpose of the program was to assist farmers who were the victims of a natural disaster, the GAO found the Secretary's administration of the program to be inconsistent and based

upon subjective factors, United States General Accounting Office, USDA Needs Objective Criteria for Awarding Special Disaster Payments, Report to the Honorable Berkley Bedell, (November 2, 1982) at 14-15 (reprinted at R. 99-100), and recommended that the Secretary develop rules to guide his discretion. Obviously, the GAO found "law to apply" or it would have been unable to reach the conclusion that the program was being arbitrarily administered.

In response to the GAO report, the Secretary adopted a "Report of Committee to Establish Special Disaster Payment Criteria" (R. 105-108). The Secretary's Report established the explicit criteria under which the Secretary is to implement disaster payments under § 1444d(b)(2)(D). This Report was

presented to Congress as "established" policy. See Problems Caused by the Drought Situation: Hearing Before the Committee on Agriculture, House of Representatives, 98th Cong., 1st Sess. 49 (1983) (statement of Everett Rank). The Report plainly furnishes "law to apply" in considering plaintiffs' challenge to the Secretary's refusal to implement the Special Disaster Payments Program.

2. The holding of the Court of Appeals that there is ample law to apply in reviewing the Secretary's refusal to provide SDPP payments to any farmer regardless of financial damage caused by the 1983 drought does not establish a broad precedent but simply applies established precedent to a specific statute.

a. This Court has consistently held that the "committed to agency discretion" exception to judicial review under the APA is to be narrowly construed. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

b. Nothing in Heckler v. Chaney, ___ U.S. ___, 105 S.Ct. 1649 (1985) is to the contrary. This case simply stands for the proposition that the decision whether to launch or not to launch an enforcement action by a civil regulatory agency is not subject to judicial review. The plaintiffs in this case do not challenge an enforcement action by a regulatory agency, but the refusal of the Secretary to make disaster benefits available to farmers contrary to the will of Congress.

3. The anti-injunction provision of 15 U.S.C. § 714b(c) has no applicability to an action against the Secretary seeking to force him to comply with the Congressional mandate to provide Special Disaster Payments under certain situations.

a. Congress vested authority in the Secretary of Agriculture, not the CCC, to determine whether SDPP benefits should be provided. See 7 U.S.C. § 1444d(b)(2)(D).

b. The Commodity Credit Corporation is not a party to this lawsuit.

c. The plaintiffs' dispute is not with the administrators at the Commodity Credit Corporation concerning the management of government-owned property, but with the Secretary of Agriculture

for failing to carry out his statutory mandate under 7 U.S.C. § 1444d(b)(2)(D).

4. The Secretary's claim that the ruling of the Court of Appeals would "displace Congress's preference for a system of crop insurance with an expanded system of cash payments that the Department of Agriculture estimates would run into tens of millions of dollars annually, and potentially into the billions," Petition at 11, is grossly inaccurate.

a. The holding of the Court of Appeals emphatically does not displace the Congressional preference for federal crop insurance. The holding simply requires that benefits be available where federal crop insurance was either inadequate to cover the loss or where

the loss was not covered due to "transitional problems attendant to the Federal crop insurance program." See 7 U.S.C. § 1444d(b)(2)(D)(ii).

b. If the Secretary were able to implement a program of crop insurance that provided adequate coverage for producers and smooth out transitional problems, no payments would be made under the SDPP. See 7 U.S.C. § 1444d(b)(2)(D). Unfortunately, the Secretary did not have such a program in place covering livestock farmers in 1983.

5. The Secretary's real dispute is not with the holding of the Court of Appeals, but with the Congress.

a. In 1981, the Secretary sought to abolish the SDPP. See S. Rep. No. 126,

97th Cong., 1st Sess., at 27, as reprinted in 1981 U.S. Code Cong. & Ad. News 1967, at 1992. Congress insisted, however, that the SDPP be available where federal crop insurance was inadequate or did not cover the loss due to transitional problems. See S. Rep. No. 126, 97th Cong., 1st Sess., at 76, as reprinted in 1981 U.S. Code Cong. & Ad. News, at 2041.

b. After the decision in State of Iowa et al. v. Block was rendered, the Congress retained the SDPP in the 1985 farm bill. See Food Security Act of 1985, Pub.L. 99-198, 99 Stat. 1354, 1400. The Secretary is frustrated because he cannot get the Congress to adopt his notion of the public interest with respect to the SDPP. This Court, however, does not sit to afford the

Secretary political remedies that he is unable to obtain from the Congress.

CONCLUSION

For all the above reasons the Secretary's petition for writ of certiorari in the above-captioned matter should be denied.

Respectfully submitted,

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RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

STATE OF IOWA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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GAO, *Report to the Honorable Berkley Bedell, House of Representatives: USDA Needs Objective Criteria for Awarding Special Disaster Payments* (Nov. 2, 1982) 5

S. Rep. 97-126, 97th Cong., 1st Sess. (1981) 4, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1818

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

STATE OF IOWA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Respondents pay scant attention to the statutory language that plainly authorizes—but does not require—the Secretary to act in the circumstances of this case. Nor can respondents overcome the absence of law to apply to enable a court to review the Secretary's decision not to implement the discretionary SDPP in this instance. Rather, respondents' submission serves to underscore the need for this Court to review the Eighth Circuit's transformation of the Secretary's discretionary authority into a mandatory benefits program.

1. The decision below remanded the case to the district court to "consider [respondents'] requests for preliminary and permanent injunctive relief compelling the Secretary to implement the SDPP" (Pet. App. 16a-17a). On remand, the

district court required the Secretary to promulgate final regulations. In order to avoid the confusion that would be generated by regulations "implementing" a program under a decision this Court might reverse, we sought a stay of proceedings pending disposition of the petition for a writ of certiorari. After initially entering a temporary stay, Justice Blackmun denied our application on May 16, 1986. In order to comply with the district court's order, the Secretary published proposed regulations on May 20, 1986 (51 Fed. Reg. 18552). The State of Iowa, a respondent in this case, filed what it describes as "a lengthy Comment * * * attacking the Proposed Rule" (Br. in Opp. 13).[1] It is now apparent that unless this Court halts the administrative process set in motion by the decision below, pointless and protracted litigation will ensue challenging the validity of regulations the Secretary need never have issued. Further litigation inevitably will arise each time the Secretary decides whether to implement his discretionary authority in a given emergency. There is scarcely any basis to suppose that Congress chose to have the Secretary's discretionary response to emergency disaster situations restricted by a bureaucratic straitjacket and subject to judicial hindsight, as here, years after the event.[2] The statute makes it plain that Congress intended nothing of the sort. In place of the flexibility and efficiency with which Congress intended the Secretary to respond to emergencies, the decision below has planted the seed of administrative encumbrance. This Court should grant review to uproot that seed before it germinates.

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[1]Pursuant to the district court order, the Secretary issued final regulations effective June 9, 1986 (51 Fed. Reg. 21326).

[2]This case involves the SDPP provision for feed grain producers only, but the statutory language is identical to other provisions relating to producers of rice, wheat, and upland cotton (see Pet. 2 n.1). Thus, if the decision below is permitted to stand, it is predictable that similar challenges will be generated under the companion provisions for other crops.

2. Respondents are incorrect in stating (Br. in Opp. 20-21) that the decision below follows established law. As we have explained (Pet. 18-19), the decision flies in the face of this Court's repeated instruction that courts may not step in to supply criteria for agency action where Congress has omitted to do so in its grant of discretionary authority. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 & nn. 11-14 (1984); *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985). Moreover, the decision below deprives Congress of the important power to delegate discretionary authority based on conditions precedent without having a court intrude its judgment into the process to create a mandatory program whenever it believes the conditions are met. Review is therefore warranted to protect this important legislative option.

3. Respondents assert (Br. in Opp. 15-16 (emphasis added)) that in authorizing the discretionary SDPP, Congress "*expected* the Secretary to provide disaster payments [under 7 U.S.C. 1444d(b)(2)(D)] when he found" that certain enumerated conditions exist, *i.e.*, (1) that there is an economic emergency due to production losses caused by natural disaster, (2) that federal crop insurance payments and other federal assistance are " 'insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the federal crop insurance program; and' " (3) that " 'additional assistance must be made available * * * to alleviate the economic emergency.' " That Congress had no such "expectation" is reflected in the plain language of the statute, which expressly states that the Secretary "*may*" provide such payments *on the condition that* such factors are found to exist. As our petition (at 12-14, 17) explains, neither the language nor structure of Section 1444d(b)(2)(D) *requires*

the Secretary to take the permitted action.[3] Indeed, Congress expressly abolished the *mandatory* SDPP where federal crop insurance is available (see 7 U.S.C. 1444d(b)(2)(A)-(C)), and couched the authority granted under Subsection (D) in terms of the unqualified permissive "may." The court of appeals has read this distinction out of the Act, and has undone Congress's careful design to provide a limited, *discretionary* power to be exercised in accordance with the Secretary's judgment so as not to undermine the crop insurance program and Congress's overall plan to reduce direct federal financial involvement in the agricultural industry. The decision below effectively eliminates Congress's option to set threshold conditions to trigger discretionary authority without converting the conditions into an automatic mandate for action. Cf. *Young* v. *Community Nutrition Institute,* No. 85-664 (June 17, 1986).

4. Respondents incorrectly assert (Br. in Opp. 16-18) that Senator Heflin's remarks provide controlling legislative history. As we have explained (Pet. 17 nn. 16 & 17), Senator Heflin addressed only one narrow aspect of the discretionary SDPP, *i.e.,* the authority to grant assistance where the inadequacy of crop insurance was due to "transitional problems attendant to the Federal crop insurance program" (7 U.S.C. 1444d(b)(2)(D)(ii)). Senator Heflin's examples of transitional situations in which the use of disaster payments "would be equitable to producers" (S. Rep. 97-126, 97th Cong., 1st Sess. 78 (1981)) do not suggest a mandatory requirement, nor were they codified in the statute. Clearly, then, those remarks do not offer a court any "law" to apply.[4]

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[3]The three statutory findings are conditions that must be met before the Secretary may even consider using his discretion under the Act.

[4]In any event, respondents do not contend that Senator Heflin described the situation in this case as one in which discretionary payments would be appropriate.

5. The "administrative materials" relied on by respondents (Br. in Opp. 18-20) also provide no guidance to a court considering the Secretary's action in this case. The cited materials all postdated the relevant legislation and do not address the question in this case: the Secretary's decision whether to implement his discretionary authority in a given emergency. Rather, the materials upon which respondents rely refer to questions that arise in administering the program after the Secretary's decision to implement has been made. Thus, respondents cite a GAO report written more than one year after the Agriculture and Food Act of 1981 was enacted. That report focused on the situation that obtained when the Secretary chose to implement the program of discretionary SDPP payments for certain counties in Texas, Oklahoma and New Mexico in 1982; it criticized the *administration* of the program in that instance. GAO, *Report to the Honorable Berkley Bedell, House of Representatives: USDA Needs Objective Criteria for Awarding Special Disaster Payments* (Nov. 2, 1982) [hereinafter cited as GAO report].[5] As the dissent in the court of appeals pointed out (Pet. App. 21a), the GAO report "has no binding effect on the Secretary" and "specifically assumes that the Secretary has decided to implement the program in a particular situation and only suggests that the Secretary adopt uniform criteria in determining what specific areas will be eligible to receive payments." The report does not address the issue presented here, much less provide "law" for a reviewing court to apply. Moreover, the GAO report (at 15) recognizes that "[t]he Agriculture and Food Act of 1981 provides USDA with discretionary authority to award

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[5]The GAO report (at 2) (emphasis added)) states that "USDA *used* its discretionary authority to award disaster payments in an inconsistent manner" by designating certain counties for payments when more seriously affected nearby counties were not designated, based on " 'subjective' " determinations of the severity of damage (*id.* at 9). See also *id.* at 10.

special disaster payments," and finds (*id.* at 16) "indications [that] suggest that disaster payments discourage [federal crop insurance] participation." Therefore, while it does not discuss the factors that might guide an implementation decision, the GAO report implicitly supports the Secretary's position that Congress intended to commit that decision to the Secretary's sole discretion.

Respondents also cite (Br. in Opp. 19) the "Report of [the] Committee to Establish Special Disaster Payment Criteria" issued by the Department of Agriculture in response to the GAO report. As with the GAO report to which it responds, the cited report does not purport to bind the Secretary's hand in determining whether to invoke his discretionary authority under Section 1444d(b)(2)(D) in the first instance, but simply proposes uniform criteria (as recommended by the GAO) for administering the program once it has been activated in a given emergency.

6. Respondents' remaining arguments are insubstantial.

a. They contend (Br. in Opp. 22-23) that the anti-injunction statute, 15 U.S.C. 714b(c), does not apply because this is a suit against the Secretary under the Administrative Procedure Act, and not against the Commodity Credit Corporation (CCC) or its property.[6] As Judge Fagg recognized (Pet. App. 22a-23a), that contention draws a distinction without a difference. Respondents have demanded *implementation* of a *program* for *payment of benefits* administered by the CCC out of CCC funds. Thus, the ultimate relief sought in this case amounts to an injunction against the CCC and its property, in direct contravention of

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[6]Respondents tellingly assert (Br. in Opp. 22-23 (emphasis added)) that their quarrel is with the Secretary "for failing to carry out his statutory *mandate* under 7 U.S.C. § 1444d(b)(2)(D)." Of course, Section 1444d(b)(2)(D) creates no mandate; by its terms it is simply a delegation of authority to agency discretion.

the express prohibition of 15 U.S.C. 714b(c). It is appropriate for this Court to grant review in order to rectify the Eighth Circuit's mistaken exercise of remedial authority. See *Lyng* v. *Payne,* No. 84-1948 (June 17, 1986).

b. Respondents argue (Br. in Opp. 23-24) that the relief they demand (implementation of the discretionary SDPP) would pose no danger to the success of the congressionally-preferred crop insurance program.[7] They assert that "[t]he holding [below] simply requires that benefits be available where federal crop insurance [does not cover the loss]," and point out (*id.* at 24) that "[i]f the Secretary were able to implement a program of crop insurance that provided adequate coverage for producers and smooth out transitional problems, no payments would be made under the SDPP." This tautology is irrelevant, because the statute prohibits SDPP payments where crop insurance is adequate. At all events, when Congress enacted the discretionary SDPP it was concerned that the availability of cash payments would detract from the successful implementation of the crop insurance program. S. Rep. 97-126, *supra,* at 75-76. In order to prevent that result, Congress chose to *permit* the Secretary, in his discretion, to provide cash SDPP payments under very limited conditions where he finds, inter alia, that crop insurance was "insufficient" for a particular disaster situation. Obviously, if cash payments are automatically available whenever crop insurance is "insufficient," there would be no occasion for an exercise of discretion, and Congress's provision that the Secretary "may" provide such payments in certain situations is converted to a directive that he "must" provide payments whenever the conditions pertain. Apart from draining all meaning from the

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[7]Respondents also contend (Br. in Opp. 23-24) that the Secretary's cost estimate for compulsory implementation is "grossly inaccurate," but they suggest no alternative estimate or basis for such an alternative.

plain language of Section 1444d(b)(2)(D), respondents' argument is circular and would effectively prevent the Secretary from successfully implementing the crop insurance program: producers would be discouraged from purchasing crop insurance if they knew that SDPP benefits could be obtained automatically and without cost to compensate for their inadequate insurance coverage.

c. Finally, respondents incorrectly accuse the Secretary (Br. in Opp. 24-26) of trying to abolish the discretionary SDPP by administrative fiat.[8] To the contrary, it was Congress that discontinued cash disaster assistance in order to encourage greater reliance on federal crop insurance. As respondents state, the administration bill for the 1981 Act proposed elimination of the previous system of disaster payments. See S. Rep. 97-126, *supra,* at 28-29. That proposal was adopted in the final enactment. 7 U.S.C. 1444d(b)(2)(C). All the major bills considered prior to enactment focused on reducing the federal involvement in the agriculture industry and substituting market factors as the prevailing norm. S. Rep. 97-126, *supra,* at 25-28. The limited, discretionary SDPP originated as a "*new* discretionary disaster payment program" (*id.* at 27 (emphasis added) (description of the bill proposed by Senator Huddleston)) and a departure from the general trend, undertaken with great caution to avoid undermining the success of crop insurance. *Id.* at 75-76. By opposing the conversion of a clearly discretionary program into a mandatory one, the Secretary is therefore simply endeavoring to carry out the statute as envisioned by Congress.

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[8]Indeed, as we have explained (Pet. 3-4 n.3), the Secretary did provide considerable assistance to Iowa farmers under several other federal programs and Iowa farmers received substantial indemnities under the federal crop insurance program.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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